No. A-002247-15T4

IN THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

SHARON BEN-HAIM,
Plaintiff-Appellant,
v.

DANIEL EDRI, et al.,
Defendants-Respondents.

CIVIL ACTION
ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY,
BERGEN COUNTY: LAW DIVISION
(Hon. Brian R. Martinotti, J.S.C.)

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE

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This brief is submitted to provide the Court with the views of the United States concerning the Superior Court's dismissal of Plaintiff-

Appellant Sharon Ben-Haim's suit against seven Israeli officials, pursuant to the United States' suggestion of immunity submitted to the Superior Court. See 28 U.S.C. § 517 ("The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."). The State Department determined that Ben-Haim's claims challenge only actions that were taken by the defendants in their capacity as officials of the State of Israel and that the defendants are immune from this suit. That determination is binding on the courts. In the view of the United States, the Superior Court's order of dismissal should be affirmed. The United States expresses no position on the merits of Ben-Haim's claims.

STATEMENT OF THE ISSUE

Whether the Superior Court correctly determined that the United States' suggestion of immunity for the seven foreign-official defendants is controlling and required dismissal of Ben-Haim's suit.

PROCEDURAL HISTORY

Ben-Haim brought suit against the Rabbinical Courts Administration of the State of Israel and seven individual defendants: six judges of Israel's rabbinical courts and one employee of the Rabbinical Courts Administration, the courts' administrative agency. Pa1, Pa6-Pa11 (Compl. Apr. 13, 2015). Ben-Haim's complaint asserts claims of aiding and abetting kidnapping, defamation, and intentional infliction of emotional distress. Pa19-Pa28. Those claims relate to an ongoing marital and custody dispute between Ben-Haim and his former wife, Oshrat, who resides in Israel with their minor daughter. Pa11-Pa19.

The defendants removed this action to federal district court under a provision of the Foreign Sovereign Immunities Act, a statute generally establishing the immunity from civil suit of foreign states and their agencies or instrumentalities and providing for limited exceptions to a foreign state's immunity from suit. 28 U.S.C. § 1441(d); see *id.* §§ 1330, 1602-1611; see also Pa166 (1T5-1T6) (noting removal). The federal district court dismissed Ben-Haim's claims against the Rabbinical Courts

Administration because the court concluded that that entity is a foreign state within the meaning of the Foreign Sovereign Immunities Act, see 28 U.S.C. § 1603(a) and (b), and that Ben-Haim's claims do not come within any statutory exception to foreign-state immunity. Order, *Ben-Haim v. Edri*, No. 15-3877 (D.N.J. Oct. 1, 2015). The federal district court then remanded the suit back to the New Jersey Superior Court because it determined that once the Rabbinical Courts Administration was removed from the case, the federal district court lacked subject matter jurisdiction over the suit. *Id*.

The United States filed a suggestion of immunity on behalf of the individual defendants in the Superior Court. Pa147-Pa156.[1] The United States' suggestion of immunity informed the Superior Court that the Government of Israel had asked the State Department to recognize the immunity of the seven individual defendants to this suit. Pa152. After considering the matter, the State Department determined that the seven

[1] Pages are missing from the United States' suggestion of immunity in the copies of Ben-Haim's brief and appendix served on the United States. For the Court's convenience, we have reproduced the suggestion of immunity in an appendix to this brief.

individuals are officials of the State of Israel and that Ben-Haim's suit challenges only acts those defendants took in their capacities as Israeli officials. "[T]aking into account principles of immunity articulated by the Executive Branch in the exercise of its constitutional authority over foreign affairs and informed by customary international law," the State Department determined that each of the seven individual defendants is "immun[e] from suit with respect to this action." Pa156. The United States' suggestion of immunity conveyed that determination to the Superior Court and informed that court that the Executive Branch's immunity determination is binding as a matter of federal law. Pa150-Pa154. The Superior Court determined that the Executive Branch's suggestion of immunity is controlling in this litigation and dismissed Ben-Haim's suit. Pa173-Pa174 (1T 20-1T22); see Pa162 (order of dismissal). Ben-Haim appeals from that decision. Pa158-Pa159.

STATEMENT OF FACTS

This litigation arises out of a complicated marital and custody dispute between Ben-Haim, a New Jersey resident, and his former wife,

Oshrat, currently an Israeli resident. The marital and custody disputes involve parallel proceedings in Israel and New Jersey.

1. In 2010, Ben-Haim, Oshrat, and their daughter visited Israel. Pa11; FPA 741/11 *Anonymous v. Anonymous*, at 1-2 (2011) (Isr.).[2] At the time, all three were New Jersey residents; Ben-Haim and Oshrat also are Israeli citizens. Pa6-Pa7; FPA 741/11 *Anonymous*, at 1. While in Israel, Oshrat initiated divorce proceedings against Ben-Haim in an Israeli rabbinical court and obtained a *ne exeat* order, which prevented Ben-Haim from leaving the country with their daughter. Pa12. After Oshrat agreed to the lifting of the *ne exeat* order against Ben-Haim, the Israeli rabbinical court

[2] FPA 741/11 *Anonymous v. Anonymous* (2011) (Isr.) is a decision of the Supreme Court of Israel in Ben-Haim's custody dispute with Oshrat. Ben-Haim relied on that decision in this Court, see Pb10, and in the Superior Court, see Pa12 (¶ 44), Pa14 (¶ 53), Pa15 (¶ 59). This Court may take judicial notice of the judicial decisions of a foreign country. N.J. R. Evid. 201(a); 202(b). We ask that the Court take judicial notice of the Israeli Supreme Court decision insofar as it is part of the factual and procedural background of this case, and insofar as it states Israeli law. For the Court's convenience, we have reproduced a copy of the decision in the appendix to this brief.

lifted the order, and Ben-Haim returned to New Jersey alone. FPA 741/11 *Anonymous*, at 2.

Through counsel, Ben-Haim petitioned an Israeli family court under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), Oct. 24, 1980, T.I.A.S. No. 11670, S. Treaty Doc. No. 99-11, seeking an order directing his daughter's return to New Jersey. Pa12; FPA 741/11 *Anonymous*, at 2; see *Abbott v. Abbott*, 560 U.S. 1, 5 (2010) ("The [Hague] Convention provides that a child abducted in violation of 'rights of custody' must be returned to the child's country of habitual residence, unless certain exceptions apply."). The family court ruled in Ben-Haim's favor, holding that Oshrat had illegally retained their daughter in Israel and directing Oshrat to return their daughter to New Jersey. Pa14; FPA 741/11 *Anonymous*, at 2-3. An intermediate appellate court denied review. FPA 741/11 *Anonymous*, at 3. Oshrat obtained review in the Supreme Court of Israel, which held that Oshrat had wrongfully retained her daughter within the meaning of the Israeli statute implementing the Hague Convention, but that an order of immediate

return was not required under the Convention because, the court determined, Ben-Haim had consented to Oshrat and their daughter's stay in Israel as part of a negotiation to lift the rabbinical court's *ne exeat* order preventing him from leaving the country. *Id*. at 17; see Pa15.

After the intermediate appellate court denied review, Ben-Haim initiated proceedings in the New Jersey Superior Court, Chancery Division Family Part. Pa14. The Superior Court stayed proceedings pending the decision of the Israeli Supreme Court. Pa14-Pa15. After the Israeli Supreme Court ruled, the Superior Court ordered Oshrat to return her daughter to New Jersey on pain of arrest. Pa86. When Oshrat failed to return the child, a New Jersey warrant was issued for her arrest, and the United States issued an Interpol Red Notice for Oshrat, relating to that charge. Pa97, Pa99. The Superior Court eventually granted Ben-Haim a default judgment of divorce from Oshrat and an order granting him temporary custody of their daughter. Pa101-Pa104.

Oshrat has not been able to obtain a divorce from Ben-Haim in the proceedings in Israel, however. Under Israeli law, a Jew may obtain a

divorce from his or her spouse only with the spouse's consent. Op. Isr. Att'y Gen., at 8, HCJ 5815/13 *Doe v. The Great Rabbinical Court in Jerusalem* (July 23, 2015) (Isr.) (Israeli AG Op.).[3] But Israeli law gives the rabbinical courts authority to issue sanctions orders to pressure a non-consenting spouse into giving consent. *Id*. at 9. In an order of September 2011, the Israeli rabbinical court ordered Ben-Haim to agree to divorce his wife. *Id*. at 1-2. When he refused, the rabbinical court issued two "limitation orders," in January and February of 2012, intended to pressure Ben-Haim into giving his consent. *Id*. at 3-4. Those orders had no effect on Ben-Haim because they imposed disabilities on him in Israel (such as prohibiting him from holding an Israeli driver's license), which he did not feel in New

[3] The opinion of the Attorney General of Israel was filed in the Supreme Court of Israel in still-ongoing litigation relating to Ben-Haim and Oshrat's marital dispute. Ben-Haim has relied on the opinion in his brief before this Court. See Pb23-Pb24 (quoting extensively from opinion). Ben-Haim thus does not dispute the accuracy of the description of Israeli law in the Israeli Attorney General's opinion, and we ask the Court to take judicial notice of the opinion for that purpose and insofar as it relates to the factual and procedural background of this case. See N.J. R. Evid. 201(a); 202(b). For the Court's convenience, we have reproduced a copy of the Israeli Attorney General opinion in the appendix to this brief.

Jersey. *Id*. at 3. The rabbinical court thus issued a third order, which (1) declared Ben-Haim a criminal; (2) directed others not to do Ben-Haim any favor, and refrain from talking with him, praying with him, negotiating with him, or burying him; (3) ordered the publication of Ben-Haim's status in a local newspaper in New Jersey; and (4) directed that a copy of the court's order be provided to Ben-Haim's rabbi in New Jersey. *Id*. at 4-5.

2. The litigation on appeal to this Court relates to actions the individual defendants took in the marital and custody proceedings in Israel and in conveying the rabbinical court's orders in New Jersey. Ben-Haim's complaint asserts three causes of action. First, Ben-Haim contends that the foreign-official defendants aided and abetted kidnapping by continuing the legal proceedings in Israel, despite the Superior Court's order that his daughter be returned to New Jersey (Pa19-Pa20); entering a *ne exeat* order preventing his daughter from leaving Israel until January 2017 (Pa20); and granting Oshrat custody over their daughter so that she could enroll their daughter in school (*id*.). Second, Ben-Haim claims that the foreign officials

defamed him by entering the third sanctions order described above (Pa22); sending letters and using other media to publish defamatory statements (Pa22-Pa23); and conveying the rabbinical court's order in person to Ben-Haim's rabbi in New Jersey (Pa23). Third, Ben-Haim contends that the foreign-official defendants have intentionally inflicted emotional distress on him by issuing *ne exeat* orders and imposing sanctions on him in Israel (Pa24-Pa25); by harassing him in New Jersey pursuant to the third sanctions order (Pa25-Pa26); and by permitting Oshrat to continue to obtain relief in the rabbinical courts in Israel (Pa27).

In response to Ben-Haim's suit against the foreign officials, Israel sent diplomatic correspondence to the State Department, asking the State Department to recognize the immunity of the defendants from this suit. See Pa155 (Letter from Mary E. McLeod, Principal Deputy Legal Adviser, Department of State to Benjamin C. Mizer, Principal Deputy Attorney General, Civil Division, U.S. Department of Justice (Dec. 3, 2015) (McLeod Letter)) (describing diplomatic correspondence). In that correspondence, "[t]he Government of Israel stated that the claims in this case relate to the

acts Defendants performed in their official capacities in the exercise of governmental authority." *Id*. at 1.

In light of Israel's request, the State Department invited Ben-Haim to submit to it any materials he believed to be relevant to the State Department's immunity determination. See Pa170 (1T13). Ben-Haim submitted materials in response to that invitation. *Id*. After considering the matter, including Ben-Haim's submissions, the State Department determined that Ben-Haim's claims "expressly challeng[e] Defendants' exercise of their official powers as employees of Israel's rabbinical court system" and "as officials of the Government of Israel." Pa155-Pa156 (McLeod Letter). Under "these circumstances, taking into account principles of immunity articulated by the Executive Branch in the exercise of its constitutional authority over foreign affairs and informed by customary international law, and considering the overall impact of this matter on the foreign policy of the United States," the Department of State determined that the foreign-official defendants are immune from Ben-Haim's suit. Pa156 (McLeod Letter).

The United States' suggestion of immunity conveyed the State Department's determination to the Superior Court, Pa147-Pa154, which, after a hearing, Pa163-Pa175 (1T1-1T24), dismissed Ben-Haim's suit in light of the suggestion of immunity, Pa162.

STANDARD OF REVIEW

Whether the Executive Branch's suggestion of immunity required dismissal of Ben-Haim's suit is a question of law this Court reviews *de novo*. See, *e.g.*, *Forrestall v. Forrestall*, 389 N.J. Super. 1, 4 (App. Div. 2006).

SUMMARY OF ARGUMENT

I. Pursuant to the foreign-relations powers assigned to it by the United States Constitution, the Executive Branch historically defined the principles governing a foreign state's immunity from suit. For many years, if the State Department determined that a foreign state was immune from suit and filed a suggestion of immunity in the litigation, under Supreme Court precedent, the court was required to surrender its jurisdiction. In 1976, Congress codified the principles of foreign-state immunity and transferred responsibility for making such immunity determinations from

the Executive Branch to the courts. The Supreme Court has held, however, that Congress left in place the Executive Branch's authoritative role in determining a foreign official's immunity from suit.

In this case, after considering the Government of Israel's request that the State Department recognize the immunity of the defendants from this suit and considering documents submitted by Ben-Haim, the State Department determined that Ben-Haim's suit challenges only the individual defendants' official acts and that the defendants are immune from the suit. The United States filed a suggestion of immunity informing the Superior Court of the Executive Branch's determination. The Superior Court dismissed Ben-Haim's suit pursuant to the suggestion of immunity. Under the controlling Supreme Court precedent, the Superior Court's dismissal order was required. This Court should therefore affirm.

II. Ben-Haim's contrary arguments lack merit. Ben-Haim's principal argument on appeal is that the Superior Court erred in deferring absolutely to the Executive Branch's suggestion of immunity. He contends that, while the State Department's determinations of status-based foreign-official

immunity (such as the immunity of incumbent heads of state) are binding, immunity determinations that turn on a foreign official's conduct are entitled only to deference. But that distinction has no basis in the Supreme Court precedent recognizing the Executive Branch's controlling role in determining foreign-official immunity. And the Executive Branch's authority to make both status- and conduct-based foreign-official immunity determinations is grounded in the Executive Branch's constitutional authority to conduct the Nation's foreign relations.

Ben-Haim further argues that courts need not defer to the Executive Branch's foreign-official immunity determinations in suits alleging violations of *jus cogens* norms, *i.e.*, peremptory rules of international law, such as the prohibition against genocide and slavery. Even assuming that foreign officials could not be immune from suits alleging violations of *jus cogens* norms, Ben-Haim makes no attempt to show that the claims he asserts are such norms, and there is no basis for such a contention. More fundamentally, Ben-Haim's argument is inconsistent with the rule,

accepted by the Supreme Court, that the foreign-official immunity principles accepted by the Executive Branch are controlling.

Ben-Haim next argues that the defendants' alleged acts are not official, and so not entitled to immunity, because they were taken on behalf of a religious tribunal and not on behalf of the State of Israel. But that characterization is directly at odds with the State Department's determination that the rabbinical courts *are* courts of the State of Israel and that the conduct Ben-Haim challenges is official in nature. Ben-Haim further contends that the State Department's suggestion of immunity is inconsistent with an opinion of the Attorney General of Israel, which, Ben-Haim contends, determined that the defendants' acts were not official. But Ben-Haim mischaracterizes the Israeli Attorney General's opinion. Moreover, the Government of Israel sent the State Department diplomatic correspondence formally expressing its view that the defendants' acts were official in nature. After considering the matter, the State Department accepted that determination. Finally, Ben-Haim's claims that the State Department did not consider the Israeli Attorney General's opinion and

that Ben-Haim was given no opportunity to respond to the State Department's suggestion of immunity are belied by the record.

ARGUMENT

I. UNDER CONTROLLING SUPREME COURT PRECEDENT, THE SUPERIOR COURT PROPERLY DISMISSED BEN-HAIM'S SUIT PURSUANT TO THE UNITED STATES' SUGGESTION OF IMMUNITY

A. The United States Constitution allocates the Nation's foreign-relations power to the federal government. See *Medellín v. Texas*, 552 U.S. 491, 511 (2008). "Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers." *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003). And "[a]lthough the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *Id*. (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)). As an exercise of its foreign-relations powers, the Executive Branch has, historically, defined the

principles governing a foreign state's immunity from suit in the United States, taking into account international law and the foreign-relations interests of the United States.

International law is composed, in part, of rules and principles governing the conduct of nation states. Restatement (Third) of the Foreign Relations Law of the United States, § 101 (1987) (Restatement). Although international law may take the form of a treaty or other formal agreement, it also consists of the "law of nations" or "customary international law," *i.e.*, uncodified rules and principles that "result[] from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement § 102(2).

For centuries, principles of customary international law have specified the circumstances under which a state may be sued in the courts of another state. See, *e.g., The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (recognizing the immunity of a French warship from suit *in rem* under then-prevailing customary international-law norms). The United States' failure to respect the customary international-law limitations

on suits against another state could have serious implications for the Nation's foreign relations. See, *e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004) (discussing category of law of nations "admitting of a judicial remedy and at the same time threatening serious consequences in international affairs"); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 840-41 (D.C. Cir. 1984) (discussing possible foreign policy consequences of overly expansive interpretations of customary international law governing foreign-state immunity). Suits against foreign states therefore directly implicate the federal government's exercise of the Nation's foreign-relations powers. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983) ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident."). Suits against foreign officials raise the same concerns. See, *e.g.*, *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895) ("[T]he acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers.").

In light of the consequences that suits against foreign states have on the exercise of core constitutional powers vested in the federal political branches, courts look to the Executive Branch and Congress for the principles of immunity governing suits against foreign states and foreign officials. Before 1976, courts followed the Executive Branch's foreign-sovereign immunity determinations. Under the framework adopted by the Supreme Court, if a foreign state was sued and wished to assert immunity, "the diplomatic representative of the sovereign could request a 'suggestion of immunity' from the State Department." *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). If the State Department determined that the foreign state was immune from suit under the principles accepted by the Executive Branch, the United States would file a suggestion of immunity and "the district court surrendered its jurisdiction." *Id*. The Executive Branch's immunity determination was, the Supreme Court explained, a "rule of substantive law governing the exercise of the jurisdiction of the courts." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945). Thus, it was "not for the courts to deny an immunity which our government has seen fit to allow, or to allow

an immunity on new grounds which the government has not seen fit to recognize." *Id*. at 35. "Although cases involving individual foreign officials as defendants were rare," the courts followed the same procedure "when a foreign official asserted immunity." *Samantar*, 560 U.S. at 312.

In 1976, Congress enacted the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1441(d), 1602-1611, which codified the principles governing foreign-state immunity, and transferred "primary responsibility for deciding 'claims of foreign states to immunity' from the State Department to the courts." *Samantar*, 560 U.S. at 313 (quoting 28 U.S.C. § 1602). That statute did not, however, codify principles governing the immunity of foreign officials from suit. See *id*. at 325. Instead, Congress left in place the framework under which courts defer to suggestions of immunity filed by the United States, pursuant to the State Department's determination of a foreign official's immunity from suit. See *id*. at 323 ("We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity.").

B. In this case, the State of Israel sent diplomatic correspondence to the State Department, providing its view that Ben-Haim's claims relate to acts the individual defendants took in their capacities as governmental officials, and asking the State Department to recognize the immunity of the defendants from this suit. Pa155 (McLeod Letter). The State Department agreed that Ben-Haim's claims challenge the defendants' exercise of their powers as officials of the Government of Israel. Pa155-Pa156 (McLeod Letter). And, taking into account principles of immunity recognized by the Executive Branch and informed by customary international law, the State Department determined that the defendants are immune from Ben-Haim's suit. Pa156 (McLeod Letter). The United States conveyed that determination to the Superior Court in a suggestion of immunity. Pa147. The Superior Court accepted the immunity determination and dismissed Ben-Haim's suit. Pa162.

The Superior Court's order of dismissal was required by the applicable Supreme Court precedent and should be affirmed. See *Samantar*, 560 U.S. at 323; see also *Hoffman*, 324 U.S. at 35 ("It is * * * not

for the courts to deny an immunity which our government has seen fit to allow.").

II. BEN-HAIM'S ARGUMENTS TO THE CONTRARY LACK MERIT

On appeal, Ben-Haim contends that the Superior Court erred in concluding that the United States' suggestion of immunity required dismissal of his suit against the Israeli official defendants, because the Executive Branch's determinations are not controlling if they involve conduct-based immunity or implicate peremptory *jus cogens* norms. Ben-Haim further argues that the State Department's immunity determination was mistaken and failed to take into account an opinion of the Attorney General of Israel, and that he was not permitted to respond to the suggestion of immunity. None of those arguments have merit.

A. 1. Ben-Haim's central argument on appeal is that the Superior Court erred in giving controlling effect to the Executive Branch's suggestion of immunity because, according to Ben-Haim, only the State Department's status-based immunity determinations are binding, but the

State Department did not determine that the defendants are entitled to immunity by virtue of their status. Pb15-Pb19. That argument is mistaken.

Generally speaking, the immunity enjoyed by an official of a foreign state is either status-based or conduct-based. Under customary international-law principles accepted by the Executive Branch, certain high officials such as heads of state enjoy immunity from suit by virtue of their status as incumbent office holders, and that immunity extends to all suits brought during such officials' time in office, regardless of whether the actions on which the suit is based are official or private. See 1 *Oppenheim's International Law* 1038 (Robert Jennings & Arthur Watts eds., 9th ed. 1996). By contrast, the immunity of former high officials, as well as lower-level current and former officials, depends on the conduct at issue and generally applies only to acts taken in an official capacity. See *id.* at 1043-44.

Relying on the decision of the United States Court of Appeals for the Fourth Circuit on remand from the Supreme Court in *Samantar*, Ben-Haim argues that the State Department's conduct-based immunity determinations are not binding. Pb17 (discussing *Yousuf v. Samantar*, 699

F.3d 763 (4th Cir. 2012)). The Fourth Circuit stated that while the Executive Branch's authority to determine status-based immunity is based on the President's constitutional power to recognize foreign sovereigns, "there is no equivalent constitutional basis suggesting that the views of the Executive Branch control questions of [conduct-based] foreign official immunity." *Yousuf*, 699 F.3d at 773; see Pb17-Pb19 (adopting that view); see also generally *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (discussing the recognition power). But that understanding—which no other court of appeals has adopted—is incorrect.

As an initial matter, the Supreme Court in *Samantar* did not distinguish between conduct-based and status-based immunities in discussing the deference traditionally accorded to the Executive Branch. Rather, in endorsing the framework under which courts looked to the Executive Branch's immunity determinations, the *Samantar* Court recognized that the same approach applied in cases involving the conduct-based immunity of foreign officials. 560 U.S. at 311-12. Indeed, the two cases cited by the Supreme Court involving foreign officials—*Heaney v.*

Government of Spain, 445 F.2d 501 (2d Cir. 1971), and *Waltier v. Thomson*, 189 F. Supp. 319 (S.D.N.Y. 1960)—both involved consular officials who were entitled only to conduct-based immunity for acts carried out in their official capacity.[4] And in reasoning that Congress did not intend to modify the historical practice regarding individual foreign officials, the Supreme Court cited *Greenspan v. Crosbie*, No. 74 Civ. 4734, 1976 WL 841 (S.D.N.Y., Nov. 23, 1976), in which the district court deferred to the State Department's recognition of conduct-based immunity of individual foreign officials. See *Samantar*, 560 U.S. at 321-22.

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[4] The conduct-based immunity of consular officials is now governed by the Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. But that convention did not apply to the *Waltier* case, which predated the convention. *Waltier* instead applied the immunity principles previously articulated by the Executive Branch. See *Waltier*, 189 F. Supp. at 320, 321; see also *Samantar*, 560 U.S. at 311-12 (explaining that when the United States filed no suggestion of immunity, a court could itself determine whether the requisites for immunity existed under the established policy of the State Department). Similarly, the *Heaney* Court assumed that the convention did not apply to the conduct at issue, which predated the convention's entry into force, and held that the defendant was immune from suit under principles accepted by the Executive Branch. 445 F.2d at 505-06.

Moreover, Supreme Court decisions predating the enactment of the Foreign Sovereign Immunity Act establish that the Executive Branch's authority to make foreign-sovereign immunity determinations, and the court's obligation to defer to such determinations, stem generally from the President's constitutional responsibility over foreign relations and not just from the more specific recognition power, as the Fourth Circuit proposed. See, *e.g.*, *National City Bank v. Republic of China*, 348 U.S. 356, 360 (1955) ("As the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit."); *Hoffman*, 324 U.S. at 34 (Jurisdiction over suits against a foreign sovereign "will be surrendered on recognition, allowance and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs when its certificate to that effect is presented to the court by the Attorney General."); *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943) (The State Department's immunity determination "must be accepted by the courts as a conclusive determination by the political arm of

the Government that the continued [litigation] interferes with the proper conduct of our foreign relations.").

The Executive Branch's authority to make foreign-official immunity determinations similarly is grounded in its power to conduct foreign relations. While the scope of foreign-state and foreign-official immunity is not invariably coextensive, see *Samantar*, 560 U.S. at 321, one basis for recognizing the immunity of current and former foreign officials is that "the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers." *Underhill*, 65 F. at 579. As a result, suits against foreign officials—whether they are heads of state or lower-level officials—implicate much the same considerations of comity and respect for other nations' sovereignty as do suits against foreign states. See *id*.; see also *Heaney*, 445 F.2d at 503.

Because the Executive Branch's conduct-based foreign-official immunity determinations are supported by the Executive's constitutional authority over foreign relations, deference by the federal courts to such determinations is required as a matter of separation of powers. See *Rich v.*

Naviera Vacuba S.A., 295 F.2d 24, 26 (4th Cir. 1961) (holding that a suggestion of immunity "should be accepted by the court without further inquiry" because "the doctrine of the separation of powers under our Constitution requires [the court] to assume that all pertinent considerations have been taken into account"); *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) ("When the executive branch has determined that" a foreign sovereign is immune from suit, "[s]eparation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the Executive in its constitutional role as the nation's primary organ of international policy."). Similarly, the Supremacy Clause of the Constitution and principles of federalism require state courts to defer to the federal Executive Branch's foreign-official immunity determinations. See *Garamendi*, 539 U.S. at 413 ("[A]t some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the concern for uniformity in this country's dealings with foreign nations that animated the Constitution's allocation of the foreign

relations power to the National Government in the first place.") (quotation marks omitted).

Thus, it continues to be the Executive Branch's role to determine a foreign official's immunity from suit. Ben-Haim is mistaken in arguing that the Executive Branch's determinations of conduct-based immunity are not entitled to controlling weight.

2. Ben-Haim further argues (Pb17-Pb20) that the Executive Branch's foreign-official immunity determinations are not binding in suits in which the foreign official is alleged to have violated *jus cogens* norms, *i.e.*, rules of international law that are "peremptory, permitting no derogation." Restatement § 102, cmt. k. Ben-Haim again relies on the Fourth Circuit's *Yousuf* decision for that proposition. After concluding that the Executive Branch's determination was not binding, the Fourth Circuit adopted the categorical rule that foreign officials cannot enjoy immunity for alleged violations of *jus cogens* norms because a state cannot officially authorize a violation of such a norm. *Yousuf*, 699 F.3d at 773-77. Ben-Haim's argument is incorrect for two reasons.

First, even if it were correct that a foreign official could not be immune from suit for an alleged violation of a *jus cogens* norm, Ben-Haim makes no attempt to show that the claims *he* asserts— aiding and abetting kidnapping, defamation, and intentional infliction of emotional distress— allege violations of *jus cogens* norms, nor is there any basis for such a contention. *Jus cogens* is "an elite subset of the norms recognized as customary international law." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992). Customary international law generally is based on state practice and consent: "A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm." *Id*. *Jus cogens* norms, by contrast, are binding on all states, regardless of their consent. *Id*. at 715-16. There are, however, only a very small number of norms that have been recognized by members of the international community as having the status of *jus cogens*, and there is not complete agreement even about which norms qualify. See Restatement § 102, reporters' n. 6 ("Although the concept of *jus cogens* is now accepted, its content is not agreed."). In any event, the norms on which Ben-Haim

relies—prohibitions against aiding and abetting kidnapping, defamation, and intentional infliction of emotional distress—are not among the few norms considered by the international community as having *jus cogens* status. See, *e.g.*, Restatement § 702 & reporters' n. 11 (describing as *jus cogens* violations: genocide; slavery or slave trade; murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; and systematic racial discrimination); see also, *e.g., Taveras v. Taveraz*, 477 F.3d 767, 782 (6th Cir. 2007) (holding that "parental child abduction" does not violate a *jus cogens* norm of customary international law).

Second, and fundamentally, the Fourth Circuit's *per se* rule of non-immunity is inconsistent with the basic principle that Executive Branch immunity determinations establish "substantive law governing the exercise of the jurisdiction of the courts." *Hoffman*, 324 U.S. at 36. The Executive Branch has not recognized the categorical rule adopted by the Fourth Circuit. In multiple cases, both before and after the Supreme Court's decision in *Samantar*, the Executive Branch has suggested immunity for

foreign officials who were alleged to have committed acts that may constitute *jus cogens* violations.[5] The courts deferred to the Executive Branch's suggestions of immunity in those cases.[6] Accordingly, the Executive Branch's suggestion of immunity is controlling in this suit, regardless of whether Ben-Haim alleged *jus cogens* violations.[7]

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[5] See, *e.g.*, U.S. Amicus Br. at 19-25, *Matar v. Dichter*, No. 07-2579-cv (2d Cir. Dec. 19, 2007); U.S. Amicus Br. at 23-34, *Ye v. Zemin*, No. 03-3989 (7th Cir. Mar. 5, 2004); see also, *e.g.*, Statement of Interest & Suggestion of Immunity at 7-11, *Rosenberg v. Lashkar-e-Taiba*, No. 1:10-cv-5381 (E.D.N.Y. Dec. 17, 2012); Suggestion of Immunity at 6, *Doe v. De León*, No. 3:11-cv-01433 (D. Conn. Sept. 7, 2012); Statement of Interest & Suggestion of Immunity at 5-8, *Giraldo v. Drummond Co.*, No. 1:10-mc-00764 (D.D.C. Mar. 31, 2011).

[6] See *Matar v. Dichter*, 563 F.3d 9, 14-15 (2d Cir. 2009); *Ye v. Zemin*, 383 F.3d 620, 626-27 (7th Cir. 2004); *Rosenberg v. Pasha*, 577 F. App'x 22, 23- 24 (2d Cir. 2014); *Doe v. De León*, 555 F. App'x 84, 85 (2d Cir. 2014); *Giraldo v. Drummond Co.*, 493 F. App'x 106, 107 (D.C. Cir. 2012) (per curiam).

[7] In *Yousuf*, while the Executive Branch declined to recognize the defendant's immunity from suit, it expressly asked the Fourth Circuit *not* to address the plaintiffs' argument that a foreign official cannot be immune from a suit involving an alleged violation of a *jus cogens* norm because considering that argument was unnecessary to resolve the appeal. U.S. Amicus Br., *Yousuf*, *supra*, No. 11-1479, at 19 n.3 (Oct. 24, 2011). For that additional reason, the Fourth Circuit erred in adopting its *per-se* rule.

B. Ben-Haim's remaining claims are meritless.

1. Ben-Haim argues that the defendants' alleged acts are not official and so cannot be entitled to foreign-official immunity. He contends (Pb20-Pb23, Pb25) that the defendants' acts were taken on behalf of a religious tribunal and not on behalf of the State of Israel. But the State Department considered and rejected that very argument: "Although Plaintiff asserts that the rabbinical courts are religious, rather than judicial, institutions, the orders he complains of were issued by courts of the State of Israel." Pa156 (McLeod Letter) (citation omitted); see also Pa155-Pa156 ("By expressly challenging Defendants' exercise of their official powers as employees of Israel's rabbinical court system, [Ben-Haim's] claims challenge Defendants' exercise of their official powers as officials of the Government of Israel.") (McLeod Letter). In light of the controlling nature of the Executive Branch's immunity determination, there is no basis for Ben-Haim to second-guess the State Department's evaluation of the nature of the defendants' acts.

2. Ben-Haim contends that the State Department's determination is mistaken and fails to take into account an opinion filed by the Attorney General of Israel in the Supreme Court of Israel in the litigation between Oshrat and Ben-Haim stemming from the rabbinical courts. See p. 9, n.3, *supra*. As Ben-Haim characterizes it, the Israeli Attorney General's opinion concludes that the defendants "lacked the authority to take the actions that [they] did against [Ben-Haim]." Pb22-Pb23. Those acts were therefore "outside of the law" (Pb23) he contends, and so could not qualify as "official acts" for which defendants could be immune (*id.*). There are two problems with that contention.

First, Ben-Haim mischaracterizes the Israeli Attorney General's opinion. That opinion does say that the rabbinical courts lack the authority to require sanctions not authorized by statute. Israeli AG Op. ¶ 31. But the opinion expressly considered Ben-Haim's argument "that the decision of the Rabbinical Court was granted *ultra vires*." *Id.* ¶ 14. And it concluded that, while the rabbinical court could not require extra-statutory sanctions, "it may provide a non-obligating opinion of Jewish law as for the manner

in which [Ben-Haim] should be treated, in light of his refusal to divorce his wife despite the ruling of the Rabbinical Court obliging him to do so." *Id.* ¶ 7. And that is how the opinion characterized the third sanctions order, which is the basis of Ben-Haim's current suit. See *id.* ¶ 33 ("Under these circumstances, the official decision of the rabbinical court dated July 31st 2012 must be viewed as a non-binding opinion of the court as to how [Ben-Haim] should be treated in light of [his] refusal to grant his wife a divorce, despite the ruling of the rabbinical court requiring him to do so."). Thus, the Israeli Attorney General's opinion on which Ben-Haim relies recognizes the third sanctions order as a valid (though non-binding) order of the rabbinical court.

More importantly, the Government of Israel formally communicated to the State Department its official view "that the claims in this case relate to the acts Defendants performed in their official capacities in the exercise of governmental authority." Pa155 (McLeod Letter). And, after considering the matter, the State Department accepted that determination.

Pa156. (McLeod Letter). Again, Ben-Haim has no basis to second-guess the State Department's evaluation of the official status of the defendants' acts.[8]

3. Finally, Ben-Haim argues (Pb26) that he was not given the opportunity to present his views to the State Department, that the Executive Branch did not take into account the Israeli Attorney General's opinion, and that he was not given an opportunity to respond to the suggestion of immunity. Those assertions, however, are incorrect. As was made clear at the hearing in the Superior Court, Ben-Haim submitted materials he believed relevant to the immunity determination to the State Department—at the State Department's own invitation. Pa170 (1T13). After the United States filed the suggestion of immunity, the Superior Court continued the hearing to give Ben-Haim an opportunity to respond. Pa197(2T7-2T8). And after Ben-Haim subsequently raised the Israeli Attorney General's opinion, the State Department reviewed the document

[8] For the foregoing reasons, this case presents no occasion to consider the application of foreign official immunity principles where an official has acted *ultra vires* under municipal law.

and concluded that it did not alter the State Department's determination concerning the defendants' immunity from this suit. Pa170(1T14).

CONCLUSION

For the foregoing reasons, the Court should affirm the Superior Court's dismissal order.

Respectfully submitted,

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August 22, 2016

APPENDIX

SHARON BEN-HAIM and OFIR BEN-HAIM, *Plaintiffs* v. DANIEL EDRI, DAVID BAR SHILTON, EYAL YOSEF, ZION BOARON, ELIEZER IGRA, ZION ELGRABLI, and SAMUEL GAMLIEL, *Defendants.*	)	**Superior Court of New Jersey, Bergen County** Docket No. L-003502-15 CIVIL ACTION

SUGGESTION OF IMMUNITY BY THE UNITED STATES

INTRODUCTION

The United States respectfully submits this Suggestion of Immunity to inform the Court of its determination regarding the immunity of the seven individual defendants named in this action (hereinafter "defendants").[1] This case implicates principles of foreign official immunity, and the United States has strong interests in ensuring the correct application of those principles as accepted by the Executive Branch. The Department of State has made the determination, to which the court must defer, that defendants enjoy immunity. In arriving at this determination, the United States emphasizes that it expresses no view on the merits of plaintiffs' claims.

BACKGROUND

On April 13, 2015, plaintiffs, Sharon Ben-Haim and Ofir Ben-Haim (hereinafter "plaintiffs"), brought an action in this Court against the "Rabbinical Religious Courts Administration of Israel" (hereinafter "the rabbinical courts"), six judges on Israel's rabbinical

[1] This filing is submitted pursuant to 28 U.S.C. § 517, which provides that "any officer of the Department of Justice[] may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

courts, and an employee of the rabbinical courts, for aiding and abetting kidnapping, defamation, and intentional infliction of emotional distress.[2] On June 9, 2015, defendants removed the case to the U.S. District Court for the District of New Jersey on the basis of 28 U.S.C. § 1441(d), which provides for removal of "[a]ny civil action brought in a State court against a foreign state."[3] On June 29, 2015, plaintiffs filed a motion to remand the case to state court, and on October 1, 2015, the district court granted plaintiffs' motion. In its remand order, the district court found that the rabbinical courts are an organ of a foreign state entitled to immunity under the Foreign Sovereign Immunities Act ("FSIA") and, therefore, dismissed plaintiffs' claims against them. Because the foreign state status of the rabbinical courts was the district court's sole basis for jurisdiction under 28 U.S.C. § 1441(d) and § 1330, the district court found it lacked jurisdiction over the remaining claims and remanded the case to this Court.

As this Court is aware, the claims in this case arise in the context of the marital and custody disputes between plaintiff Sharon Ben-Haim (hereinafter "Plaintiff") and his estranged wife being litigated in New Jersey and Israel. Plaintiff alleges that in 2010, his wife, Oshrat, deceived him into traveling, together with their daughter, Ofir, from New Jersey to Israel, where Oshrat subsequently initiated divorce proceedings and allegedly "committed parental abduction by detaining Ofir in Israel." Compl. ¶¶ 3-4. Thereafter, Plaintiff avers that he initiated divorce and custody proceedings in New Jersey, *id.* ¶ 4, and ultimately obtained a state court order on

[2] Both Plaintiff and the U.S. District Court for the District of New Jersey appear to treat the rabbinical courts and the Rabbinical Courts Administration ("RCA"), the administrative body that oversees the rabbinical courts, as one and the same. *Compare* Complaint caption (naming the "The Rabbinical Religious Courts Administration of Israel"), *with* Compl. ¶¶ 24-25, identifying the defendants as "the Rabbinical Religious Courts of Israel"; *see also* Remand Order, *Ben-Haim v. Edri*, No. 15-cv-3877, ¶ 8 (D.N.J. Oct. 1, 2015) (ECF No. 31) (analyzing whether the "Rabbinical Courts" constitute a body of a foreign state for purposes of the removal statute, despite Plaintiff naming the RCA); Report and Recommendation, No. 15-cv-3877 at 10-14 (Aug. 27, 2015) (ECF No. 19) (same). For purposes of this filing, the government uses the term "rabbinical courts" to refer to both the rabbinical courts themselves and the RCA.

[3] For purposes of the removal statute, a foreign state "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a).

January 7, 2013, entering judgment in his favor on his divorce complaint and granting him custody of Ofir, *id.* ¶ 75, Exhibit 11. Plaintiff also alleges that Oshrat was charged in New Jersey with criminal abduction and contempt for violating court orders instructing her to return Ofir to her father in New Jersey. *Id.* ¶ 80.

Of the remaining defendants, six are rabbinical judges involved in adjudicating Plaintiff's marital and child custody disputes in Israel's courts, and the seventh, Samuel Gamliel, works in the Agunot Division of the rabbinical courts. Plaintiff's first claim is that defendants have aided in his daughter's kidnapping by: failing to terminate any of the proceedings in front of the rabbinical courts, *see id.* ¶ 82; issuing a *ne exeat* warrant[4] preventing Ofir from leaving Israel until 2017, *see id.* ¶ 83; and granting Oshrat custody of Ofir and allowing Oshrat to enroll Ofir in school in Israel, *see id.* ¶ 84. Plaintiff's second claim is that defendants have defamed him by issuing and attempting to implement a "Ruling–Warrant" that sanctions Plaintiff for failing to comply with an order issued by the Regional Rabbinical Court of Haifa to grant his wife a divorce, thereby making her "aguna"; Plaintiff alleges that the Ruling-Warrant refers to him as a "criminal." *Id.* ¶¶ 97-99, Ex. 12. In addition to the Ruling-Warrant, Plaintiff alleges that Mr. Gamliel made defamatory statements about Plaintiff when Mr. Gamliel, "on behalf of" the rabbinical courts, met with Plaintiff's rabbi. Compl. ¶¶ 31, 102. Plaintiff's third claim, of intentional infliction of emotional distress, is based largely on the allegations in his first two claims and, in particular, his resultant inability to have a relationship with his daughter. *Id.* ¶¶ 108-17.

[4] Elsewhere Plaintiff claims that defendants aided in Ofir's kidnapping by "refusing to vacate a *ne exeat* order issued" to keep Ofir in Israel. Compl. ¶ 21. A *ne exeat* order, literally "that one not depart," restrains a person from leaving the jurisdiction of the court or state.

ARGUMENT

Based Upon Principles Of Foreign Official Immunity Accepted By The Executive Branch, Defendants Are Immune From Suit.

A. The Department of State's Foreign Official Immunity Determinations Are Controlling and Not Subject to Judicial Review.

Unlike foreign sovereign immunity determinations, which are now governed by the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 et seq., the immunity of foreign officials continues to be resolved according to a long-standing two-step procedure. *See Samantar v. Yousuf*, 560 U.S. 305, 325 (2010) ("Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the [FSIA's] origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity."); *Rosenberg v. Lashkar-e-Taiba*, 980 F. Supp. 2d 336, 341 (E.D.N.Y. 2013) *aff'd sub nom. Rosenberg v. Pasha*, 577 F. App'x 22 (2d Cir. 2014) ("[C]ourts have extended this two-step procedure to provide foreign officials immunity from civil suits.").[5] Under this regime, a diplomatic representative of the sovereign can request a "Suggestion of Immunity" from the Department of State. *Samantar*, 560 U.S. at 311. If the Department of State accedes to the request and files a Suggestion of Immunity, the court "surrender[s] its jurisdiction." *Id.* If the Department of State takes no position in the suit, the "court 'ha[s] authority to decide for itself whether all the requisites for such immunity exist[],'" applying "'the established policy of the [State Department].'" *Id*. (internal citations omitted; alteration in original).

As the U.S. Court of Appeals for the Second Circuit has recognized, the separation of powers requires courts to defer to the Executive Branch's determination regarding foreign

[5] In cases involving claims of immunity, courts need not address the immunity question until they have first determined other threshold issues, including whether a foreign official defendant has been properly served and whether the court has personal jurisdiction. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007).

official immunity. *See Matar v. Dichter*, 563 F.3d 9, 15 (2009) ("Here, the Executive Branch has urged the courts to decline jurisdiction over appellants' suit, and under our traditional rule of deference to such Executive determinations, we do so."); *Rosenberg*, 577 F. App'x at 24 ("[I]n light of the Statement of Interest filed by the State Department recommending immunity . . . the action must be dismissed"). And as the U.S. Court of Appeals for the Seventh Circuit observed in *Ye v. Zemin*, "'[i]t is a guiding principle in determining whether a court should [recognize a suggestion of immunity] in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs . . . by assuming an antagonistic jurisdiction.'" 383 F.3d 620, 626 (2004) (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (alteration in original)). Similarly, principles of federalism require state courts to defer to Executive Branch immunity determinations.[6] Thus, "'[t]he common law of foreign sovereign immunity is, perhaps uncharacteristically, facile and straight-forward: if the State Department submits a Suggestion of Immunity, then the district court surrender[s] its jurisdiction.'" *Rosenberg*, 980 F. Supp. 2d at 341 (quoting *Tawfik v. al–Sabah*, 2012 WL 3542209, at *2 (S.D.N.Y. Aug. 16, 2012) (alteration in original)).

B. The Department of State Has Determined that Defendants Are Immune From Suit.

According to the procedure set forth above, the Court should dismiss this action because the Department of State has determined that defendants are immune from this suit. As a general matter, under principles of customary international law accepted by the Executive Branch, a

[6] *See e.g.*, *Rendon v. Funes*, No. 2014-2756-CA-01 (11th Fl. Jud. D. May 27, 2014) (dismissing suit against sitting head-of-state based on Executive Branch determination of immunity); *Guardian F. v. Archdiocese of San Antonio*, No. 93-CI-11345 (225th Tex. Jud. D. Mar. 15, 1994) (dismissing Pope based on suggestion of immunity filed by Executive Branch); *Anonymous v. Anonymous*, 181 A.D.2d 629, 629-30 (N.Y. Sup. Ct. App. Div. 1992) (dismissing suit against unnamed head of state based on Executive Branch determination of immunity); *Kline v. Kaneko*, 535 N.Y.S. 2d 303, 304-05 (N.Y. Sup. Ct. 1988) (dismissing suit based on "conclusive" determination of head-of-state immunity), *aff'd*, 546 N.Y.S. 2d 506 (N.Y. App. Div. 1989).

foreign official enjoys immunity from suit based upon acts taken in an official capacity.[7] In making the immunity determination, the Department of State considers, *inter alia*, a foreign government's request (if there is such a request) that the Department of State suggest the official's immunity. Notwithstanding such a request, the Department of State could determine that a foreign official is not immune. That would occur, for example, should the Department of State conclude that the conduct alleged was not taken in an official capacity, as might be the case in a suit challenging an official's purely private acts, such as personal financial dealings. In making that determination, it is for the Executive Branch, not the courts, to determine whether the conduct alleged was taken in a foreign official's official capacity. *See Hoffman*, 324 U.S. at 35 ("It is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.").

Here, the Government of Israel has requested the Department of State to recognize the immunities of the seven defendants. Upon careful consideration of this matter, the Department of State has determined that defendants are immune from suit in this case. *See* Exhibit 1 (Letter from Mary E. McLeod, Principal Deputy Legal Adviser, Department of State, to Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Civil Division, Department of Justice, requesting that the United States suggest the immunity of defendants).[8] In arguing otherwise, Plaintiff relies primarily on his view that, because the rabbinical courts are "religious tribunals," their judgments are not enforceable in New Jersey and they should "not [be] recognized in New

[7] Some foreign officials, such as diplomats and sitting heads-of-state, ordinarily are entitled to status-based immunity, but that type of immunity is not implicated by this case. *See, e.g., Moriah v. Bank of China Ltd.*, 2015 WL 631381, at *3 (S.D.N.Y. Feb. 13, 2015) (distinguishing between the status-based immunity of sitting heads-of-state and the conduct-based immunity of officials acting on behalf of a sovereign government).

[8] The Executive Branch's recognition of immunity for a foreign official in the civil context does not imply that the foreign official would be immune in a criminal prosecution.

Jersey as . . . judicial tribunal[s] of the State of Israel." Compl. ¶¶ 10, 37-38, 87-88.[9] Neither the religious nature of the rabbinical courts, nor the enforceability of their judgments in U.S. courts, is relevant to the issue of immunity, however. Instead, the relevant inquiry is whether the rabbinical courts are part of the Government of Israel, such that defendants' actions on behalf of the courts could be said to have been undertaken in their official capacities and whether the Department of State has determined that the officials are immune from suit. *See e.g., Rosenberg*, 980 F. Supp. 2d at 342 (deferring to Department of State's view that the Inter-Services Intelligence ("ISI") is part of the Pakistani government and that individual defendants were immune for acts taken in their capacities as Directors General of the ISI). Here, the U.S. District Court for the District of New Jersey, *see* Remand Order, *Ben-Haim v. Edri*, No. 15-cv-3877, ¶ 8 (D.N.J. Oct. 1, 2015) (ECF No. 31), the Department of State, *see* Attachment 1 at 2 (citing Complaint Exhibits 12-14), and the Government of Israel, *see id.*; www.rbc.gov.il/Documents/AboutEnglishVersion.docx, have confirmed that the rabbinical courts are courts of the State of Israel.[10]

Moreover, by expressly challenging defendants' exercise of their powers as judges and as (in the case of Gamliel) an employee of the rabbinical courts, Plaintiff's claims challenge defendants' exercise of their official powers as officials of the Government of Israel. The Complaint does not refer to any private conduct by defendants, but only to their actions as officials of the State of Israel. Plaintiff's allegations against the six judges are bound up with

[9] Plaintiff recognizes that the judges of a foreign state are state officials for immunity purposes. In his Complaint in *Ben-Haim v. Avraham et al.*¸ No. 2:15-cv-06669 (D.N.J.), which he brought against three (non-rabbinical) Israeli judges, Plaintiff recognizes that "these Defendants are Judges in a foreign State and technically entitled to immunity . . . ." Compl. ¶ 25.

[10] As noted, *supra* n.2, both Plaintiff and the district court refer to the rabbinical courts and the RCA interchangeably, and for purposes of the immunity determination, the United States is satisfied that both the rabbinical courts themselves and the RCA, which oversees the administration of the courts, are part of the Government of Israel.

orders they issued and decisions they made as part of their duties as judges on Israel's rabbinical courts, Compl. ¶¶ 82-84, 97-99 & Ex. 12, and Plaintiff's allegations against Mr. Gamliel all concern actions he allegedly took "on behalf of" the rabbinical courts "while working with" them as their "agent and messenger," *id.* ¶¶ 30, 102-04, 109f. On their face, acts of defendant foreign officials who are sued for exercising the powers of their office are treated as acts taken in an official capacity, and Plaintiff has provided no reason to question that determination.

CONCLUSION

The Department of State has determined that the seven defendant Israeli officials are immune from this suit because Plaintiff's claims relate to acts that were undertaken, if at all, in their capacities as officials of the State of Israel.

Dated: December 3, 2015

Respectfully submitted,

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Counsel for the United States

Attachment 1

United States Department of State

Washington, D.C. 20520

December 3, 2015

Benjamin C. Mizer
Assistant Attorney General
Civil Division
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington D.C. 20530

Re: *Ben-Haim v. Edri et al.*, No. L-3502-15 (Super Ct. Bergen Cty.)

Dear Mr. Mizer:

I write to request that the Department of Justice convey to the Superior Court of New Jersey, Bergen County, in the above-referenced case the determination of the Department of State that the following individuals enjoy immunity from suit with respect to this action: Daniel Edri, David Bar Shilton, Eyal Yosef, Zion Boaron, Eliazer Igra, and Zion Elgrabli, who are rabbinical judges in Israel; and Samuel Gamliel, who is an employee of the Rabbinical Courts Administration of the State of Israel (hereinafter "Defendants"). This determination of immunity should not be viewed as expressing any view on the merits of Plaintiff's claims.

This is one in a series of cases in which Plaintiff and other *pro se* plaintiffs have filed in U.S. courts complaining about their treatment by Israeli judges and other Israeli officials in child custody disputes. The previous cases were all dismissed at early stages. *E.g.*, *Ben-Haim v. Neeman*, No. 12-cv-351 (D.N.J. dismissed Jan. 23, 2013), *aff'd* 543 Fed. App'x 152, 2013 WL 5878913 (3d Cir. 2013) (per curiam); *Weiskopf v. Neeman*, No. 11-cv-665 (W.D. Wisc. dismissed Mar. 20, 2013), *appeal dismissed for failure to prosecute*, No. 13-1661 (7th Cir. June 14, 2013); *Weiskopf v. Jewish Agency for Israel, Inc.*, No. 12-cv-6844 (S.D.N.Y. dismissed April 30, 2013); *Ben Issachar v. ELI American Friends of the Israeli Ass'n for Child Protection, Inc.*, No. 5:13-cv-2415 (E.D. Pa., Mem. Feb. 25, 2014 dismissing case), *appeal dismissed for failure to prosecute*, No. 14-2824 (3d Cir. Dec. 9, 2014); *Ben Issachar v. v. ELI American Friends of the Israeli Ass'n for Child Protection, Inc.*, No. 2:14-cv-5527 (E.D. Pa.) (dismissed Nov. 5, 2014). In addition to the instant case and *Ben-Haim v. Neeman*, Plaintiff recently filed *Ben-Haim v. Avraham*, Civil Action No. 2:15-cv-6669 (D.N.J.), a case against three Israeli judges who were involved in his divorce and child custody cases in Israel.

By note verbale dated June 9, 2015, the Government of Israel requested that the United States Government suggest immunity for the individual Defendants. The Government of Israel stated that the claims in this case relate to the acts Defendants performed in their official capacities in the exercise of governmental authority.

The immunity of a foreign official is based upon that official's conduct and extends only to acts that individual took in an official capacity. By expressly challenging Defendants' exercise of their official powers as employees of Israel's rabbinical court system, Plaintiff's

claims challenge Defendants' exercise of their official powers as officials of the Government of Israel. The complaint refers to no private conduct by Defendants, but only to their official actions.

In particular, Plaintiff alleges that defendants Edri, Josef, and Bar Shilton issued an order to plaintiff's rabbi in New Jersey demanding that he excommunicate Plaintiff as a sanction for Plaintiff's refusal to grant his wife a divorce, as the rabbinical courts had ordered, and as a means of pressuring him to do so. Complaint ¶¶ 23, 98 & Exhibit 12. Plaintiff also alleges that defendants Boaran, Igra, and Elgrabli, members of the appellate tribunal of the rabbinical courts, upheld the actions of the other judge defendants. *Id.* Plaintiff alleges that defendant Gamliel, acting as a "messenger" for the rabbinical courts, made defamatory statements to Plaintiff's rabbi in New Jersey in an attempt to pressure Plaintiff into granting his wife a divorce, as the courts had ordered. *Id.* ¶¶ 30-31, 102-03.

Acts of defendant foreign officials who are sued for exercising the powers of their office are generally treated as acts taken in an official capacity, and Plaintiff has provided no reason for the State Department to conclude otherwise. Although Plaintiff asserts that the rabbinical courts are religious, rather than judicial, institutions (Complaint ¶¶ 10, 36-40, 88-90), the orders he complains of were issued by courts of the State of Israel. *See, e.g.*, Complaint Exhibits 12-14. Upon careful consideration of this matter, the Department of State has determined that Defendants are immune from suit in this case.

In light of these circumstances, taking into account principles of immunity articulated by the Executive Branch in the exercise of its constitutional authority over foreign affairs and informed by customary international law, and considering the overall impact of this matter on the foreign policy of the United States, the Department of State has determined that Daniel Edri, David Bar Shilton, Eyal Yosef, Zion Boaron, Eliazer Igra, Zion Elgrabli, and Samuel Gamliel enjoy immunity from suit with respect to this action.

Sincerely,

Mary E. McLeod
Principal Deputy Legal Adviser

Supreme Court of the State of Israel

F.P.A. 741/11

Facing	honorary judge E. Arbel
	honorary judge H. Melcer
	honorary judge U. Vogelman
Plaintiff	Anonymous
	Vs.
Respondent	Anonymous
	Sitting regarding permission to appeal the ruling of Regional court in Nazareth from January 20th 2011 in Case Appeal No. 44293-12-10 given by honorary judges A. Avraham, Y. Avraham and D. Sarfati
Sitting Date:	Adar B 1st 5771 (March 7th 2011)
For the plaintiff:	Advocate, T. Itkin
For the plaintiff:	Advocate, G. Torres

Court ruling

Judge E. Arbel:

Permission to appeal the ruling of Regional court in Nazareth (honorary judges A. Avraham, Y. Avraham, D. Sarfati), which partially accepted the plaintiff's appeal on the ruling of Family court in Nazareth (honorary judge S. Jayyoussi), and ordered the return of the plaintiff's and respondent's mutual daughter to New Jersey, United States, by force of Hague Convention Act (returning of abductees children) 1991 (hereinafter: **the Convention Act**).

Factual background

1. The plaintiff and the respondent, both born in Israel, grew up and met each other in their home town in Israel. As of 2006, the two lived as a couple in the state of New Jersey, United States, by force of tourists' visa. On 2007 the plaintiff began studying, while the respondent continued working in odd jobs. By force of the plaintiff's schooling, they both received a staying visa for student and partner. On 2008 the plaintiff and the respondent got married in Israel, and immediately after the wedding returned to United States. On September 2009 their daughter was born in United States (hereinafter: **the daughter**). About two months later the plaintiff came to Israel with the toddler, and later on the respondent joined both of them. During that visit in Israel, which lasted about two months, the couple had opened a children's clothing shop in their home town. As the shop opening

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arrangements ended, the three of them returned to United States. On March 2010 they had arrived again at Israel for Passover holiday (hereinafter: **the last visit**). The respondent returned to United States on April 19th 2010, and the plaintiff and their daughter were to join him on June 20th 2010. However, the plaintiff and the daughter remained in Israel, in which they reside to this day.

2. To complete the picture one should note that, as pointed out in the ruling of the Family court, at some point during the relationship the respondent began embracing a religious lifestyle, while the plaintiff did not change her way of life. It created some controversy between the partners, and during the plaintiff's pregnancy the respondent even considered divorcing her. During their last visit in Israel the dispute between the partners reached a peak, when each of them stayed separately in their families' houses. On April 7th 2010, the plaintiff has filed a divorce claim in the Rabbinate court, to which she had attached the issue of custody over the mutual daughter. On April 11th 2010, the plaintiff and the respondent met, and with the mitigation of an accountant reached an agreement regarding the end of their marriage, titled "financial agreement" (hereinafter: **the agreement** or **the financial agreement**). In the agreement were paragraphs establishing the property allocation between the two partners, as well as paragraphs establishing the issues of custody over the mutual daughter, alimony and seeing arrangements. Eventually the agreement was not signed, since the plaintiff refused to sign it as the respondent rejected a demand made by her regarding possessional rights of the two. The respondent returned to United States as planned, after the plaintiff agreed to remove the warrant detaining his departure from Israel, issued against him at her request. Shortly prior to the day in which the plaintiff and the daughter were to return as planned to United States, the respondent sent the plaintiff, through his lawyer, a warning in which he pointed out that he expects their return as planned. On July 2010, as the plaintiff and the daughter did not return to United States, the respondent filed a claim to return the daughter in a court in New Jersey. Later on he has filed a similar claim to Family court in Nazareth, in which he had requested to order the return of the daughter to United States according to the appendix to the Convention Act (the Hague Convention on the Civil Aspects of International Child Abduction, 31, 43 (opened for signing on 1980); hereinafter: **the convention**).

Family court's ruling

3. The Family court in Nazareth determined that the retention of the daughter in Israel is indeed abduction as defined by the convention, and since the defenses do not apply, the daughter should be returned to United States. First was determined that there was an abduction, as defined in article 3 of the convention, while the main issue was whether at the time of the abduction the "habitual residence" of the daughter was United states. The court tested this issue according to two different schools, the "factual school" and the "intentional school". The court's decision was based primarily on the "factual school", according to which it determined that the geographic-physical place of residence of the daughter prior to the abduction was United States. Furthermore, the court discussed the "intentional school", testing the parties' intents regarding the current and future place of residence. It was determined that renting an apartment in United States and entertaining acquaintances in it, alongside establishing a business in United States, attest an intention to settle in this state. On the other hand, it was determined that the one-sided decision made by the plaintiff to quit her school in United States, opening a shop in Israel, maintain social rights, real estate and bank accounts in Israel – do not attest an immediate intention to return to Israel, but a future intention to do so at best.

After determining that abduction, as defined by article 3 of the convention, indeed occurred, the court discussed the defense claims made by the plaintiff. It was determined that the defense regarding the "abducted" parent's consent to the abduction act, as set by article 13(a) of the convention (hereinafter: **the consent defense**), does not apply in the circumstances of the case. First, it was found that the concern expressed by the plaintiff in her plea to Rabbinate court, that the respondent will abduct the daughter, indicates his refusal to stay in Israel. second, it was determined that the agreement does not suggest consent since it did not develop into a binding contract, and also since the agreement was written while the respondent was under a lot of pressure because of the detention warrant against his departure from Israel. the court also rejected the claim regarding the applicability of the defense of acquiescing with the abduction act, as defined in article 13(a) of the convention (hereinafter: **the acquiescing defense**), since the respondent sent a warning to the plaintiff shortly prior to the planned return date in which he had expected both of them to return to United States, and also since he had turned to the authorities in United States regarding the daughter's abduction about a month after the plaintiff and the daughter were due to return to United States. Thirdly it was determined that the defense regarding grave risk of exposing the minor to harm, according to article 13(b) of the convention (hereinafter: **the grave risk of harm defense**), does not apply in the circumstances of the case. The court rejected the plaintiff's claim, according to which an illegal stay of the parents in United States may harm the daughter, and clarified that the question of the legal status of the parties isn't related directly to the applicability of this defense, since it is enough that the daughter's entry to United States is possible, being an American citizen. Therefore the court ordered the return of the daughter to United States, subject to depositing a sum of 6,000$ to ensure the daughter's alimony, and subject to providing the plaintiff and the daughter accommodations in the apartment in which they had lived in United States, or an alternative apartment, for a period of 6 months.

Regional court's ruling

4. The Regional court in Nazareth rejected the plaintiff's appeal by majority of opinions, subject to corrections of the terms for returning the daughter. The majority opinion (honorary judges Y. Avraham and D. Sarfati) determined that one should not interfere with the factual findings determined by the Family court, regarding both the issue of the abduction act and the lack of applicability of the defenses. It was noted that the purpose of the convention, to prevent self justice made by the abductor parent, obliged the one claiming the defenses' applicability to present substantial evidence for its existence. Since the plaintiff did not carry this burden, it was determined that the daughter should be returned to United States, subject to depositing 10,000$ by the respondent, to ensure the daughter's alimony, and subject to providing confirmation of commencing a legal proceeding for custody in New Jersey court by the respondent. The minority opinion (V. President A. Avraham) was that the appeal should be accepted, since the acquiescing defense applies. According to this opinion, the starting point of the discussion was that the habitual residence of the daughter was New Jersey, and therefore the plaintiff's act should be defined as "wrongful retention". However, under the circumstances of the case, evidence show that the acquiescing defense applies: first, the agreement which did not develop into a binding contract was given an evidential weight in proving the respondent's acquiescing with the retention. Second, the removal of the warrant detaining the respondent's departure from Israel, under the plaintiff's consent, shortly after writing the agreement, was understood as an expression of understandings made in the agreement and as an attempt to fulfill one of its terms. Thirdly, the respondent's return to United States was presented as indicating that

the respondent has waived the immediate realization of his custodial right, as well as the immediate return of the daughter to United States.

Now we were asked to grant permission to appeal this ruling.

The plaintiff's claims

5. The plaintiff claims in the appeal request that under the circumstances of the case the terms set in article 3 of the convention do not apply, and therefore one must not determine that the retention of the daughter in Israel is wrongful. It was claimed that the parties stayed in United States temporarily, and therefore the Regional court was mistaken in his determination that the habitual residence of the daughter is United States. It was also claimed that the respondent did not prove that his custodial rights were breached, and that during the discussion in the Family court no ongoing legal proceeding was held in an authorized court in United States.

Alternatively, the plaintiff claims that the defenses against return apply. First, it was claimed that consent and acquiescing defenses according to article 13(a) of the convention – apply. According to her claims, the respondent filed the current prosecution after consenting to the unique jurisdiction of the Rabbinate court regarding the divorce and associated issues. In light of his consent the warrant detaining his departure from Israel was cancelled, and he returned by himself to United States. In addition, in the agreement the respondent gave his consent to his daughter's stay in Israel, to paying alimony in NIS (New Israeli Shekel) and also to agreed-upon seeing arrangements during his visits in Israel. according to the plaintiff's claim, the respondent was willing to accept the agreement as is while it was she who refused to sign it, due to a financial dispute between the parties. Second, it was claimed that the defense of grave risk of harm according to article 13(b) of the convention – applies, and that the best interest of the minor requires her stay in Israel. according to this claim, under the circumstances in which the daughter has no medical insurance in United States and her parents do not have a proper stay visa, the minor is exposed to actual harm if she were to return to United States. The plaintiff wishes to deduct from that that even if she had performed an act of wrongful retention, one should not order under the circumstances of the case the immediate return of the daughter to Unites States. For all the above mentioned reasons the plaintiff wishes to receive permission to appeal the ruling of the Regional court and to override the Regional court's ruling ordering the daughter's return to United States.

The respondent's claims

6. The respondent claims, on the other hand, that the permission to appeal should be denied since the current case does not involve a fundamental legal issue which exceeds the interests of the parties. Specifically he claims that in the current case the terms set in article 3 of the convention – apply. It was claimed that custodial rights of the respondent were exercised according to the law of the state of New Jersey, determining that both parents have joint custody over the daughter, and that according to Regional court's ruling a custodial claim to the court in New Jersey was filed, so that the respondent has actually exercised his custodial rights as required by the convention. The respondent further claims that there is no justification to intervene with the factual determination of the Family court that the habitual residence of the daughter is United States. He had attached to his written response several evidence, which were discussed in Regional court, which to his claim show that the parties' stay in United States wasn't temporary or limited to the plaintiff's schooling

period. Among other things he had presented confirmation of bank accounts and a certificate indicating prolonging the rent lease of the couple's apartment in United States.

The respondent thinks that the defenses against return, which the plaintiff claims, do not apply to the current case. It was claimed that the agreement does not indicate consent or acquiescing since it wasn't signed, and also since it was the plaintiff who had written in the draft attached to the agreement, by hand, "returning to Israel". As far as he's concerned, this comment indicates lack of decision regarding place of residence. The respondent adds that the harm defense also does not apply to the circumstances of the case. To his opinion, there is no concern that the parties will be deported from United States upon return, since he had received a worker's stay visa for a period of two years, while the plaintiff has a tourist stay visa for a similar period. He emphasizes that he had met every term set by Regional court to ensure the daughter welfare upon returning to United States. The rent lease of the apartment was prolonged accordingly, and the required sum of money to ensure the minor's alimony was deposited. Therefore he claims that the permission to appeal should be denied and asks to order the daughter's return to United States immediately.

7. After examining the parties' claims and discussing it, we have decided to grant permission to appeal and discuss the request as if an appeal was filed according to the granted permission.

Discussion and decision

8. In the current case, two key questions emerge. The first is whether the plaintiff performed an act of wrongful retention, as defined in article 3 of the convention, by not returning the daughter to United States on the planned date. If the answer is affirmative, the second question rises – may we conclude from the circumstances of the case that one of the defenses against immediate return as set by the convention applies, so we should not order the immediate return of the daughter to United States as required by the convention. I will discuss these questions in order.

Normative framework

9. In the last few decades, as the world became a global village, in which moving from one state to another is done easily, and people move between states often, emerged an actual need for international cooperation in dealing with the phenomenon of children's abduction by one of their parents, while breaching the custodial rights of the other parent. In most cases that the convention applies to, we deal with parents from different states of origin, that their separation inflicted conflict regarding place of residence, when each parent wishes to raise the mutual child in his home land. Sometimes, one of the parents decides to take a one-sided action of removing the child to another state, without consent of the other parent and while breaching his custodial rights. Such an act of self justice requires a quick and efficient aid, which can be given only by way of cooperation between states. On this background the convention was signed. Judge M. Cheshin points this out as he writes:

> "Hague convention and the convention act were intended to set an inter-state arrangement for a phenomenon, which was seen in the past but in our days became more and more common. The world in which we live is not the same as yesterday's world... visits of people from one state in other states became more common,

> and these visits create by nature encounters between young men and women. These encounters sometimes lead to love stories... The couple, living together in love, must decide: where will they reside – in his state or hers? The decision is made, and one of the partners follows the other. Days go by, and the couple discovers they can no longer live with each other. The partner who has left his state wishes naturally to return to his state, where he was born and raised. And he wishes – again naturally – to not part with his child. When agreement and understanding between the partner lacks, comes the abduction. However, the other partner is also not willing to give up his child, and so the issue comes before court. And the question is: under whose custody will the child be, and in which state will he reside. Hague convention was not destined to apply only for such cases, obviously, but we know that these cases are especially common" (C.A. 4391/96 **Paul Row vs. Dafna Row**, I.r. 50(5) 338, 343 (1997); hereinafter: matter of **Row**).

In the basis of the convention lays several inter-linked purposes. First, achieving inter-state cooperation in dealing with children's abduction, while breaching the custodial rights determined in the state of origin. Second, honoring the rule of law not only within the state but also in the relationship between states of the world. Third, deterring against self justice by one of the parents, and finally preventing harm to the best interest of the child being torn from his natural environment due to the abduction act (see: F.P.A. 1855/08 **Anonymous vs. Anonymous** (unpublished, 4.8.08); hereinafter: **matter of anonymous**). In order to accomplish these purposes, the convention sets an aid defined as "first aid" to the abduction act, which requires the contracting states to order the return of the child to the state from which he was abducted urgently and as soon as possible (see: C.A. 7206/93 **Gabay vs. Gabay** I.r. 51(2) 241 (1997); hereinafter: **matter of Gabay**), while leaving very limited room for discretion of the court discussing the return request.

Preliminary terms for the convention's applicability

10. An order to return a child to the state from which he was abducted and to which he was not returned may be given under the preliminary terms of the convention's applicability, set in article 3 of the convention, which turn an act to an "abduction". One should distinguish between two types of cases under this article. The first type is an act of "active abduction", meaning removal from the habitual residence of the minor to a contracting state. The second type is an act of "abduction by omission", meaning retention of the minor to a contracting state and not the state of habitual residence of the minor (See: F.P.A. 9802/09 **Anonymous vs. Anonymous** (unpublished, 12.17.09); hereinafter: **matter of anonymous(1)**).

11. Article 4 of the convention sets an age limit of the minor according to which the convention's instructions apply, and sets it on the age of 16 years. Article 3 of the convention sets three preliminary terms for defining the removal or retention of a minor as "wrongful", and therefore the convention applies: it is required that the act has breached the custodial rights of the "abducted" parent; that these rights were actually exercised; and that the state from which the minor was abducted or the state to which he was not returned was indeed the habitual residence of the minor. The term "habitual residence" isn't defined

in the convention, probably since its drafters intended to allow flexibility and ability to discuss the circumstances of each case, considering a variety of possible cases. The interpreting tendency in to give the term "habitual residence" a literal and limited interpretation, since an overly extensive interpretation might harm the fulfillment of the convention's purposes and even nullify it (see: **ibid**, art. 9; matter of **Gabay**, p. 254-255).

12. Regarding the question of "habitual residence" of the minor, two schools developed in the ruling, namely "factual school" and "intentional school". The factual school is based on testing the geographic-physical residence prior to the minor's removal. This is a factual examination and not a legal one. This school addresses the past. In its framework, one mustn't test intentions or future plans of the parents, together or separately, regarding residence. The only question asked is where did the minor reside regularly prior to the act of removal, from his point of view, or from the parent's point of view if he did not yet reached the age of testifying regarding his residence:

> "the residence is not a technical term... It expresses ongoing life reality. It reflects the place in which the child had regularly resided prior to the abduction. The point of view is that of the child and where he had resided. The examination focuses on the daily lives of the past and not on the plans for the future. When the parents live together, the habitual residence of the child is usually the parent's residence" ((retired) president A. Barak, **ibid**, p. 254).

In parallel to the factual school, gradually developed an additional school, named the "intentional school". In this school, one does not test only the physical residence of the minor prior to his abduction, but also the parent's intentions regarding the duration and circumstances of staying in the state. So, for example, the fact that the parents immigrated to a state permanently or moved there for a limited period has a different relevance in determining the "habitual residence" according to this school. The parent's intention is inferred from the circumstances of the case and the interpretation of their stay in the state (see: matter of **anonymous(1)** and the references there).

13. Of all the above mentioned, it seems that the intentional school focuses on "matters of the heart" and arguable circumstances, whereas the factual school presents an easy and simple test, objective by nature, which makes it difficult at times to consider a more complex reality. The issue of comparing the two schools and giving different weight to each of them remains to be discussed (see: C.A. 7994/98 **Dagan vs. Dagan**, I.r. 53(3) 254 (1999) (hereinafter: **matter of Dagan**); C.A.D. 10136/09 **Anonymous vs. Anonymous** (unpublished, 12.21.09)), although it is customary to test mainly the factual school, since testing the parent's intentions might erode the convention's purposes. In my opinion, the two schools should be combined, in a manner that will leave the focus in the question of factual physical residence, but will also give some weight to the parties' intentions and reality of life. Anyway, we are not asked to settle this issue in the current case. And indeed, in the current case too, the previous courts tested both schools in discussing the question of "habitual residence" of the daughter. The conclusion was that the habitual residence of the daughter prior to her retention was United States.

Defenses against return

14. The underlying perception of the convention is that the act of abduction harms the best interest and welfare of the child, since he is torn from its natural environment and

custodial parent and brought to a foreign environment, forced upon him by the other parent. Even though the term "best interest of the child" isn't mentioned in the convention, this principle underlies it, since one cannot discuss matters of children without considering their best interest (see: matter of **Gabay**, p. 251; for a discussion of the relation between the convention and children's rights see: Rona Shoz "rights of abducted children: does Hague Convention Act (returning of abductees children) 1991, coincides with the doctrine of children's rights?" **legal studies** 20, 421 (2004)). It is the question of the best interest of the child that will determine the fundamental dispute regarding child's custody. The discussion regarding procedures according to the convention act should be held in a forum that will discuss this question. Considering the purposes of the convention, and especially the importance of honoring the rule of law on an international level, the default rule is that the best interest of the child will be discussed in his habitual residence and not in the state to which he was abducted.

15. However, sometimes returning the child to his habitual residence might harm him, so it is not in his best interest. For such cases there are the defenses against return, anchored in articles 12, 13 and 20 of the convention. According to article 12 of the convention, the return is not required if the child stayed in the state to which he was abducted for more than one year, and it is proven that he has integrated well in his new environment. Article 13 sets three defenses against return: the consent and acquiescing defenses, the grave risk of harm defense and the consideration of the minor's will defense, if he has reached a proper age and degree of maturity. An additional defense is specified in article 20, according to which one may refuse to return a child if the return does not settle with fundamental principles of the state discussing the return request in regards to protecting human rights and fundamental liberties. Underlying the defenses against immediate return is the duty of protecting the child and the need to prevent grave harms which may be inflicted upon him as a result of his return.

These defenses conflict to some degree with other main purposes of the convention, specifically the purposes of preventing self justice made by the abductor parent and honoring the rule of law according to universal standards. In the balance between these two purposes, it was determined that the defenses should be used under careful consideration, lest the exception will become the rule in a manner that will undermine the purposes of the convention and nullify the obligations of the contracting states. Therefore it was determined that the burden of proof carried by the one claiming the defenses apply is a heavy burden, not to be treated lightly (see: F.P.A. 672/06 **Abu Arar vs. Raguzo** (unpublished, 10.15.06); Elisa Perez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session 426, 460 (1980) 3; hereinafter: **Perez-Vera report**). Note well, carrying the burden of proof does not terminate the possibility of returning the minor to the state from which he was removed or to which he wasn't returned. Proving that the defenses apply merely provides the court discretion whether under the circumstances of the case the minor should remain in the state to which he was abducted or to return to the state of residence, considering the convention's purposes. Obviously, in such a case, the court will place at the top of its considerations the best interest of the little child, standing in the middle between his two parents.

16. The defenses to be tested in the current case are set in article 13 of the convention, and so is written in it:

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
>
> *a.* The person, institution or other body having the care of the child was not actually exercising the custody rights at the time of removal or retention, or had **consented** to or subsequently **acquiesced** in the removal or retention; or
> *b.* There is a **grave risk** that his or her return would expose the child **to physical or psychological harm** or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views" (The emphases were made by me, E.A.).

I will discuss the essence and scope of the related defenses according to order.

The consent and acquiescing defenses

17. As aforementioned, article 13(a) of the convention sets the defenses against immediate return: the consent defense and the acquiescing defense. These two defenses have two main purposes. The first purpose is providing a proper response to a situation in which the "abducted" parent consented or acquiesced with the abduction act, in a manner which makes the need to immediately return affairs the way they were before redundant (see: C.A. 473/93 **Libowich vs. Libowich** I.r. 47(3) 63 (1993); hereinafter: **matter of Libowich**). The second purpose is preventing cynical use of the immediate return aid given in the convention, in a manner that will turn the convention to a bargaining tool in the hands of the abducted parent:

> "On the other hand, the guardian's conduct can also alter the characterization of the abductor's action, in cases where he has agreed to, or thereafter acquiesced in, the removal which he now seeks to challenge. This fact allowed the deletion of any reference to the exercise of custody rights 'in good faith', and at the same time prevented the Convention from being used as a vehicle for possible 'bargaining' between the parties" (**Perez-Vera report**, p. 461).

18. The issue of consent or acquiescing is that of custodial rights; That is, the parent's consent to or acquiescing with the factual status created in regards to custodial rights of the minor (see: matter of **Gabay**, p. 257). Unlike determining the habitual residence under article 3 of the convention, where it is customary to give some weight to the parents' intentions and future plans, in these defenses one must consider the parent's intentions regarding the minor's residence, their expectations and future plans (see: Shmuel Moran, Alon Amiran and Hadara Bar, **Immigration and Children's Abduction, Legal and Psychological Aspects** 88-89 (2003)). If these suggest consent to or acquiescing with the act of removal or retention, one should not order the return of the minor to the habitual

residence immediately. The immediate return is no longer mandatory, and becomes subjected to discussing court's discretion.

19. The consent defense and the acquiescing defense are similar in their essence and characteristics, even though the ruling mainly addresses the acquiescing defense (see for example: matter of **Dagan**; matter of **Libowich**). The main difference between the two defenses lays in the time factor – while consent is granted before the act of removal or retention, acquiescing is created in retrospect, after such an act (matter of **Gabay**, p. 257; matter of **Libowich**, p. 72). Therefore, when we wish to determine which of the two defenses applies to the circumstances of the case at hand, we should first determine whether we're dealing with consent given prior to the abduction act, or with acquiescing after the abduction act. On the subsequent stage we should examine the main question regarding the applicability of these defenses, which is whether the parent whose rights were suffered acted as would a parent whose goal is to immediately return affairs the way they were, or has he acted in a manner that indicates his consent in effect to it or acquiescing with it:

> "the existence of consent is examined in light of the question: did the "abducted" parent's behavior coincides with his intent to guard his rights regarding returning the status-quo, that is, immediately returning the child to his habitual residence from which he was removed, or whether the circumstances and his behavior suggest consent to the change in status-quo, to moving the child to the new location?" ((then) vice president judge Alon, **ibid**, p. 72).

20. Logic dictates that cases in which the question of defenses rises will be discussed individually, each case and its unique circumstances. Therefore, narrow standards regarding the issue of consent or acquiescing should not be determined. However, the boundaries of these defenses should be defined, and as mentioned above, the convention's purposes require giving it a narrow interpretation and use them with care and restrain. Three main characteristics assist in examining the applicability of the defenses and in understanding their boundaries: nature and quality of the consent or acquiescing; contract law applicability; and the weight to be given to the reasons of consent or acquiescing and to the period of time passed (matter of **Gabay**, p. 255-259; matter of **Libowich**, p. 71-75). All these will assist us in answering the question of whether the requesting parent has waived the aid of immediately returning the minor by consenting to the act from the outset or by acquiescing with it post factum. All this will be specified subsequently.

21. First, we should outline the nature and quality of the consent or acquiescing. It was determined that it should not necessarily be interpreted or done in a manner of active action. One can also learn of consent to the abduction act or of acquiescing with it from behavior by omission or implied behavior. However, not every step made by one of the parties indicates consent or renunciation. It is a fundamental examination of the abducted parent in general – we should conclude from the overall circumstances and observing the general picture that the parent has waived the immediate fulfillment of the custodial or visitation rights that he had by force of the habitual residence state prior to the act of removal or retention (see: matter of **Dagan**, p. 273). Such an examination is objective by nature. The abducted parent's subjective state of mind will be examined only as long as it realizes in his objective external behavior (see: matter of **Libowich**, p. 74). The existence of

consent or acquiescing is also learned, among other things, from the awareness of the "abducted" parent to the fact that his rights are being hurt. He needs not be aware of the specific rights granted to the parent by force of the convention. A general understanding that his parental rights are being hurt or may be hurt due to the other parent's actions is sufficient to learn of awareness. So, for example, if the parent knows that a wrongful act was done, and did not attempt to receive legal advice in the matter, it may indicate consent to the abduction act (see: matter of **Dagan**, p. 274).

22. Consent or acquiescing are contractual by nature, as it is a one-sided action done by one parent, develops within the other parent and creates a relying interest regarding the change of status quo. Therefore it was determined that contract laws apply to the consent and acquiescing defenses, including all implications (matter of **Libowich**, p. 73 and the references there; matter of **Gabay**, p. 258). So, for example, consent or acquiescing that was done by mistake, deception, coercion or exploitation should be treated as a contract done under similar circumstances and can be cancelled. Likewise, if the abductor parent was aware of the fact that the abducted parent does not waiver the change of status-quo, therefore a claim on his behalf that the defenses apply will contradict the bona fide principle. In addition, one should consider the foundation on which the parent who made the abduction act had to rely. If he had made some actions to change his condition following the consent or acquiescing of the other parent, it should be brought into account within the considerations examined under this defense, although it is befitting that the relying interest as above mentioned will be considered cautiously, lest the abductor parent enjoys the fruits of his own wrong doing (matter of **Libowich**, p. 71).

23. In addition, the **weight** to be attributed to the different circumstances in which the consent or acquiescing was given should be considered, and especially the weight to be attributed to the reasons for the consent and to the period of time that passed since the act of removal until the filing of the prosecution according to the convention. So was determined that the reasons for which the parent has consented to the abduction act or acquiesced with it will not be taken into account while examining the quality of consent or acquiescing, since it is possible that he did not want to move the minor from state to state, or he was interested in having the custodial issue discussed in the state to which the minor was abducted, being the parent's state of origin. Whatever his reasons are, if the behavior of the parent indicates consent to or acquiescing with the abduction act, one should conclude that he has waived the immediate aid granted by the convention, and is willing to solve the dispute in alternative ways (matter of **Libowich**, p. 70).

The time factor should also be considered while examining the question of whether the parent's behavior during the time passed coincides with his later demand to return the minor. Regarding the consent defense, it was ruled that one should examine the period of time that has passed since the day of abduction until the day the prosecution according to the convention was filed, and whether one can infer from it, alongside other circumstances, acquiescing of the parent with the condition created. In this context it was determined that the time in which the acquiescing consolidated is not defined, and should be learned individually in each case, according to its unique circumstances (**ibid**, p. 72-74). While examining the consent defense, the time factor is less significant. A short or long period of time might pass since the day of abduction until the day the prosecution was filed, but in most cases it will have no relevance since the consent, by nature, was given in advance, prior to the abduction act. Therefore, under the consent defense the main question is that of weight, that is, what were the circumstances indicating consent, and to what degree of

details it indicates consent of the "abducted" parent to waiving the "first aid" granted by the convention, all that subjected to the above mentioned defenses' boundaries.

24. In several cases, a parent who has consented to or acquiesced with the abduction act may wish to go back on his consent. The rule is that one cannot go back on his consent or acquiescing and cancel it retroactively. Since the time consent or acquiescing has developed, the parent whose custodial rights were harmed will be seen as if he has waived the immediate aid granted by the convention (**ibid**, p. 73; matter of **Dagan**, p. 275). Even changed circumstances do not justify going back on consent or acquiescing. As above mentioned, the main question to be asked by the court is whether the parent's behavior indicates clearly that he has waived the "first aid". If the answer is affirmative, the return of the child to the habitual residence state is not an immediate requirement the court must instruct. The time for an immediate aid has long gone, and the court discussing the matter has discretion to instruct that the matter will be discussed in the current state or in the habitual residence state, while considering the best interest of the child.

The grave risk of harm defense

25. Article 13(b) of the convention determines that where there is a grave risk that the minor's return would expose him to physical or psychological harm, or otherwise place him in an intolerable situation, the court does not have to instruct his return. The rule is that the best interest of the child considered in this defense is narrower than the one considered in regular custodial proceedings, since over-extension of the defense might nullify the convention's purposes (see: matter of **anonymous**, art. 29-33). Therefore the court used two tools intended to reduce the defense's applicability. First it was determined that the burden laid upon the one claiming the defense applies is beyond reasonable doubt, which is of course a very heavy burden of proof. Second, the defense's applicability was reduced in an interpretational way, as the principle determining the defense is that set at the end of article 13(b), according to which the child will not be returned only if there is a grave risk that his return will place him in an intolerable situation.

> "the principle determining article 13(b) of the convention is the one at its end, which regards placing the child in an intolerable situation were he to return to his habitual residence...The formula refers to placing the child in an intolerable situation...That is: one may not instruct to return a child if his return will place him "in an intolerable situation": whether that intolerable situation is due to a grave risk of exposing the child to physical or psychological harm, or his return will place him in an intolerable situation "otherwise"" (matter of **Row**, p. 347).

In addition, it was determined that the defense in question refers to harm inflicted upon the minor due to returning to the state from which he was removed, and not as a result of returning to the parent from which he was abducted or from disconnecting him from the abductor parent (see: C.D.R. 1648/92 **Turne vs. Meshulam** I.r. 46(3) 38, 46 (1992)). Accordingly, in many cases the claim of lack of parental capability of the parent requesting the aid by force of the convention was rejected, as was a claim that the abductor parent is facing deportation or substantial financial difficulty as a result of returning with the child to the state he had left (see for example: C.A. 5532/93 **Gunzburg vs. Grinvald**. I.r. 49(3) 282 (1995)). The court relies in this context only on experts' determinations, from which one can

clearly realize that the risk of physical or psychological harm is substantial. So, the harm defense is extremely narrow, only for cases in which returning the minor would expose him to physical or psychological harm, or otherwise place him in an intolerable situation.

Deduction from the general to the specific

26. In the current case, the plaintiff and the respondent were both born in Israel and went to find their luck in United States, in which they had resided since the beginning of their relationship. The plaintiff began studying, while the respondent worked in odd jobs, and at some point established a business company in partnership with the plaintiff. In United States their first daughter was born. Throughout all this time they maintained their connections in Israel, came to visit in Israel often and preserved their social rights and even opened a shop in their home town. Consensually, the plaintiff and the respondent came with their daughter to Israel for Passover holiday. In this vacation they have decided to separate. The respondent returned to United States as planned while the plaintiff did not do so, having decided to stay in Israel with the daughter. As the daughter was not returned to United States at the planned date, the respondent filed a claim for her return according to Hague convention.

27. Therefore, we deal with a case of retention, and the question at hand is whether the terms of the convention's applicability exist. The minor the respondent wishes to return to United States is extremely young. At the time in which she were allegedly to return to United States she was only nine months old, and therefore her age meets the age limit set in article 4 of the convention, determining the age limit for claiming the return of a minor according to the convention at the age of 16 years. In addition, the Regional court decided that the law in the state of New Jersey, in which the plaintiff and the respondent has resided, is that the custodial rights are joint rights. Therefore the first term set in article 3 of the convention exists, since the retention has breached the custodial rights of the respondent over his daughter. Later on, the Regional court ordered the respondent to issue a custody proceeding in the state of New Jersey before returning the daughter to United States, and the respondent attached to his written response confirmation of issuing such procedure. With that, the respondent has actually exercised his custodial rights, and the second term set in article 3 of the convention, according to which the parent requesting the return of the minor according to the convention must exercise the custodial rights granted to him, exists. Finally, the Family court determined that the habitual residence of the daughter was United States, so the third term set in article 3 of the convention for proving an act of abduction exists. In examining the issue of habitual residence by factual school and intentional school, the Regional court reached the same conclusion regarding the habitual residence prior to the act of retention. The Regional court's judges also accepted this factual determination. I do not find a reason to intervene with this factual determination of the discussing court (see: F.P.A. 911/07 **Anonymous vs. Anonymous** (unpublished 10.30.2007)). After two courts examined the circumstances of the case and reached the same conclusion, and after examining the parties' claims, I do not find justification for additional factual examination of the term regarding the habitual residence or for deviating from the rule of non-intervention in this context.

In conclusion of this issue – regarding the preliminary terms of the convention's applicability, as determined by Regional court, the plaintiff has performed an act of wrongful retention. At this point we should therefore examine whether one of the defenses against immediate return applies.

28. In order to determine whether under the circumstances of the case, the consent defense or the acquiescing defense applies, one must first examine the time factor, that is, do the circumstances indicate that the respondent consented in advance to the retention or acquiesced with it after the effect. The Family court's premise, also adopted by Regional court, was that the date of the daughter's retention is June 20th 2010, the day in which the plaintiff and the daughter were to return to United States according to the plane tickets purchased before the parties' arrival at Israel (hereinafter: **the date of retention**). The respondent issued proceedings according to Hauge convention in order to return the daughter to United States, immediately and shortly after the date of retention. At this stage I will clarify that I realize that the minority opinion in the Regional court focused on the applicability of the acquiescing defense. However, in light of the distinction I described between these two defenses, it seems that under the circumstances of the case the respondent's immediate action does not allow us to view his behavior as acquiescing with the daughter's retention. Therefore, the defense fitting the current matter is the consent defense, according to which one should examine whether the overall circumstances indicate that the respondent consented in effect to the retention and the change of status-quo, and with that actually waived the "first aid" granted by the convention. As I'll explain hereinafter, I believe that this question should be answered affirmatively, since the circumstances of the case suggest that the respondent consented prior to the date of the daughter's retention to leaving the custody over her at the plaintiff's hands.

29. The Regional court determined that the plaintiff and the respondent consensually arrived at Israel for Passover holiday. During this vacation, in which each of them stayed at their families' houses, they have decided to separate. The plaintiff turned to Rabbinate court and issued a divorce procedure, to which she attached the issue of custody over the daughter. On her request, the Rabbinate court issued a warrant detaining the respondent and the daughter against departure from Israel. The respondent turned to Rabbinate court with an urgent request to cancel this warrant. In his request, the respondent described before the Rabbinate court the course of events between the couple, and even declared that he is willing to divorce the plaintiff immediately and reach an alimony agreement with her as required. That, I emphasize, is not enough to teach of his consent to leave the custody over the daughter with the plaintiff.

Later on, the parties decided to converse and reach a separation agreement that will be acceptable by both of them. With the mitigation of an accountant, which is a mutual friend, an agreement was drafted, titled "financial agreement". The paragraphs of the agreement indicate that the parties consented to the plaintiff's and the daughter's stay in Israel, while the respondent returns to United States to his business. So was determined on paragraph 1 of the agreement that the plaintiff will remove the detaining warrant issued against the respondent at her request; paragraph 2 states that the monthly alimony for the daughter will be paid in NIS; in paragraph 3 the respondent promised to transfer on his name certain contracts that the plaintiff was signed on as a partner in the company in United States; in paragraph 4 the respondent consented to moving the plaintiff's and the daughter's equipment to Israel; and in paragraph 7 the parties determined consensual seeing arrangements were the respondent to return and reside in Israel. the overall points of agreement in this agreement teaches clearly that the parties consented that each of the parties will go their own way – the respondent will return to United States and the plaintiff and the daughter will remain in Israel.

However, at the end of the day, due to financial dispute, apparently from the plaintiff's side, the financial agreement was not signed. Nonetheless, the plaintiff performed actions indicating she began honoring her obligations according to the agreement. We learn of that by her consent to cancel the detaining warrant issued against the respondent at her request, after which the respondent has returned by himself to United States.

30. In other contexts it was said that "there is nothing holy about signature" (A.D. 40/80 **Kenig vs. Cohen** I.r. 36(3) 701, 724 (1982)), so if foundations of decision and specification exist in an agreement, it is valid even without the parties' signatures (see for example: C.A. 692/86 **Botkowsky vs. Gat** I.r. 44(1) 57 (1989)). Of course, this rule does not apply to the circumstances of the current case, since the parties agree that the financial agreement did not develop into a binding contract. However, I believe that the minority judge in the Regional court was right to determine that the agreement has a "semi-evidential" meaning in examining the respondent's consent to leaving the custody over the daughter in the hands of the plaintiff. The agreement was not signed eventually since the plaintiff refused to sign it, while the respondent was willing to accept it as is, including the paragraphs indication his consent to the daughter's stay in Israel, under the plaintiff's custody. Under these circumstances I believe that the agreement should be viewed as main evidence, assisting in completing the overall picture, which indicates that the respondent waived the urgent fulfillment of the custodial rights granted to him by force of the state of New Jersey's law.

I fully realize that the respondent attached to his written response an additional agreement draft, written to his claim by the plaintiff by hand, on which she wrote "returning to Israel" (hereinafter: **the draft**). To his claim, it attests that the parties did not agree on the issue of the daughter's residence, and therefore there wasn't any early consent regarding custody. The Family court who examined this draft treated it as a draft for the financial agreement, while the Regional court did not discuss its relevance. After reviewing the draft it becomes evident that its content does not coincide with the financial agreement's content, since it deals with a situation of reconciliation between the plaintiff and the respondent and not of separation and divorce. It wasn't clarified – and in any case wasn't proved – when was this draft written and by whom. In the absence of such information, the draft cannot teach us what the respondent wishes to teach, and in any case it seems that no one disputes the fact that the final draft of the financial agreement is the one edited by the accountant and deals with separation and with the plaintiff's and the daughter's stay in Israel.

31. In conclusion of this issue – consent is being learned from the overall circumstances and it need not be literal. Indeed, in the current case the respondent's conduct teaches that he had consented to the non-return of the plaintiff and the daughter to United States. He was involved in drafting the financial agreement, in which he had consented among other things to the issue of custody and seeing arrangements. Later on he has even made an active action by turning with the plaintiff to the Rabbinate court, requesting to remove the warrant detaining his departure from Israel, and returned to United States to his affairs, while the plaintiff and the daughter remained in Israel. I will clarify that it is indeed possible that the respondent hoped that the plaintiff and the daughter will return to United States at the date of retention, and may have even believed they would do so, especially given the fact that the marriage did not yet end officially. However, the respondent's objective behavior indicates his consent to leaving the custody over the daughter in the plaintiff's hands, and to the staying of the two of them in Israel. the subjective state of mind, feelings and expectations of the respondent are not suffice to conclude that he did not give his consent to the plaintiff's and the daughter's stay in Israel, in light of his explicit manifested actions.

32. As above mentioned, the act of consent is a contractual action by nature. After the parties conversed the issue of custody, and after the plaintiff agreed to remove the detaining warrant against the respondent's departure from Israel, he left Israel and return to his business in United States. It is certainly reasonable to assume that the chain of events, and specifically his departure from Israel under the plaintiff's consent, after the financial agreement was written and partially even fulfilled, caused the plaintiff to rely on the issue of change in status-quo, mainly separation of the couple and her stay with the daughter in Israel. while discussing the relevance of the agreement between the parties, Family court determined that:

> "the plaintiff was under stress as he had a detention warrant against him leaving Israel, which would have disrupted his plans to return to USA... Reading the draft, one can't help but wonder whether it was written under the **heavy shadow** of the detention warrant, and even if the **plaintiff's consent** would have been granted in the draft, indeed it would have been **granted under the pressure laid upon him by the detention warrant**" (Family court ruling, paragraph 28, p. 14; The emphases were made by me, E.A.).

I cannot accept such assumption, that the respondent consented to the daughter's stay in Israel only because he was under pressure laid upon him by the detention warrant against him. While negotiating for a contract, each side is surely under pressures and influenced by various considerations, and calculates his actions accordingly. The rule is that the freedom of will should be interpreted widely, and that various pressures, financial, social or political, should not be viewed as harming the minimal will (see and compare: C.A. 1569/93 **Maya vs. Panford** I.r. 48(5) 705 (1994); C.A. 1912/93 **Shaham vs. Mans** I.r. 52(1) 119 (1998)). Therefore, I do not believe that it is right to determine that the respondent was under heavy pressure due to the detention warrant, and that his consent was granted under that pressure without being able to use his discretion. Let us not forget that against the pressure under which the respondent was to continue with his plans, stood the issue of custody over his daughter, which is in itself a matter of uppermost importance.

33. The respondent's later actions, around the date of retention, may well teach that he had a change of heart regarding his daughter's stay in Israel, or that he had still hoped to reconcile with the plaintiff. The respondent sent the plaintiff a warning letter by his lawyer, close to the date of retention. He even issued proceedings to return the daughter to United States according to the convention, in the authorized court in Israel, about two months after that date. Furthermore, he acted to achieve a stay visa for himself in United States; presented documents indicating he had prolonged the rent lease and paid health insurance fees for the daughter in United States; and later he met the preliminary terms for returning the daughter as set by the Regional court. These actions indicate his desire to return the daughter to United States, and that the custody hearing in her matter will be held in his state of residence. However, these later actions do not erase the consent he had previously granted to the daughter's stay in Israel, prior to the act of retention. As above mentioned, the rule is that one cannot go back on granting consent, since the respondent's consent to the plaintiff's and the daughter's retention in Israel teaches of his waive of the immediate aid granted by the convention. Hence, in light of the overall picture arising from the specified facts, the consent defense applies to the case at hand. Therefore, the question of

returning the daughter to United States is within the court's discretion, and there is no immediate obligation to return her according to the convention.

34. In light of the determination that the consent defense applies, we need not further discuss the plaintiff's claim regarding the applicability of the grave risk of harm defense, since it is sufficient to prove one of the defenses in order to grant the discussing court the discretion to decide whether to order the daughter's return or not. In short I will comment that the burden of proving such defense applies, laid upon the one claiming it, is very heavy, and the interpretation given to it is extremely narrow. It seems that in the absence of an expert opinion in the matter, and in the absence of extreme circumstances indicating grave risk of harm, one cannot determine that this defense applies to the current case.

35. In conclusion, the convention applies to the matter at hand, since the preliminary terms for its applicability exist, and the plaintiff performed an act of wrongful retention in Israel. however, the consent defense applies to the current case, since the overall circumstances, mainly the separation agreement and the parties' behavior after writing this agreement, indicate that the respondent had consented to the mother's and the daughter's stay in Israel. Therefore the immediate return is not mandatory according to the convention and it is included in the court's discretion. I will turn now to the considerations relevant for such a decision.

36. After considering the overall circumstances, I am satisfied not to order the daughter's return to United States, and believe that the custodial issue should be discussed in the authorized court in Israel. The plaintiff and the respondent resided in United States for about four years, since the beginning of their relationship. They do not have an American citizenship – the respondent has a temporary work visa for only two years, and the plaintiff has tourist's visa, which does not allow her to work for a living. The extended families of both parties stay in Israel and they do not have a permanent housing in United States. While they resided in United States, they've established a business in Israel and maintained their bank accounts and social rights in Israel. The entire nature of the stay in United States, even if it lasted for several years, is therefore that of temporariness. As they've decided to separate, the respondent wished to return to his business in United States whereas the plaintiff wished to stay in Israel, within a family support system, while in the middle stands the mutual daughter, a very young toddler, whose both parents surely wish her the best. In my opinion, the best interest of the minor obligates discussing the custodial proceedings in her matter in Israel and not in United States. For most of her life the daughter, **who is not even two years old**, resides with the plaintiff, which is the dominant parental figure in her life, especially considering the respondent's long stay in United States, even to this day, in separation from his daughter. Under the circumstances of the couple's separation, the return of the plaintiff and the daughter to United States for the custodial proceedings might place the plaintiff in an unbearable situation, which will ultimately be against the minor's best interest. First, one cannot expect that after separating, the plaintiff and the respondent will continue residing in the apartment in which they lived as a couple, of which the lease was prolonged according to the decision made by Regional court in order to ensure the minor's accommodation. Note well, under the circumstances in which the plaintiff has only tourist's visa, and may not work for a living in United States, the plaintiff will not be able to provide for herself and the daughter for housing separately from the respondent, and if she will do so, she may face the danger of expulsion from United States. Even if the risk of such an event is not grave, I believe that we should not risk disconnecting the plaintiff from her toddler daughter, in a manner that contradicts the young daughter's best interest (see:

C.P.A. 4575/00 **Anonymous vs. Anonymous** I.r. 55(2) 321, 331 (2001)). Alternatively, the plaintiff might be forced to reside again with the respondent under the same roof, but considering the ongoing disconnection and alienation between the parties during the legal proceedings, it is reasonable to assume that joint residence of parents who do not get along will also be against the minor's best interest. Thus I believe that the above mentioned considerations, primarily the daughter being **extremely young** and the plaintiff's legal status in United States, indicate that the custodial issue should be discussed in Israel, and therefore I won't instruct her return to Unites States for the purpose of deliberating this issue.

37. In conclusion I have two comments regarding the progression of the procedure at hand. First, the respondent requested to present us with the exhibits file presented before the Regional court, and the plaintiff replied she leaves it to the court's discretion. I've reviewed the file as requested, but did not find the exhibits within it to shed light on additional aspects discussed in this decision. Its content surely influenced my current decision, but it did not convince me to accept the respondent's point of view.

A second comment refers to an announcement the respondent filed to court, in which he had informed that he is forced to leave Israel and return to his business in United States before the legal proceeding at hand ends. The plaintiff responded to this announcement by claiming that the respondent's return to United States was done while violating a detention warrant against his departure from Israel. In his response, the respondent rejected this claim. Without discussing the claim itself, since it is not necessary and we don't have enough details to make any determination in the matter, it seems that the divorce dispute has brought the parties to a bitter and alienated confrontation. I sincerely hope that as the current proceeding ends, the plaintiff and the respondent will succeed soon in achieving an understanding and resolve their differences, placing at the top of their priorities the best interest of the mutual daughter, who's entitled to have both parents present in her life.

Hence I suggest my colleagues to accept the appeal and determine that the Regional court's decision regarding the daughter's return to United States according to the convention is hereby cancelled. I also suggest cancelling the plaintiff's debit of legal expenditures as determined by Family court. Under the circumstances I do not find it appropriate to debit the respondent with the expenditures of the current discussion.

At the end of affairs I've read the opinion of my colleague, judge Vogelman, and wish to shed a light on two issues. First, I believe that there will be cases in which the overlap between civil contract law and family contract law will not be complete, and there will be a need to address uniquely the family contract (see for example: C.P.A. 8791/00 **Shalem vs. Twinko**, art. 7 (unpublished, 12.13.06); Shahar Lifshitz "Couple Contract Regularization in Israeli Law – Initial Outline" **Court Campus** 4, 271 (2004)). Second, as for the concern my colleague has regarding the negative implications of parties' willingness to maintain an effective negotiation, I believe that this concern is not an actual one, since this case has unique circumstances. In this case there was a complete agreement which was not signed eventually only due to the plaintiff's refusal while the respondent was willing to fulfill it. Beyond that, as I've emphasized, the parties began acting according to the agreement by consensually cancelling the detention warrant issued against the respondent's departure from Israel, and the respondent even left Israel and returned to United States, while the plaintiff and the daughter stayed in Israel. These unique circumstances justify in my view

seeing the respondent's consent within the negotiation between the parties as indication of the consent defense's applicability.

J u d g e

Judge H. Melcer:

1. I concur with the result my colleague, judge **E. Arbel**, has concluded in her review and with the main reasons she elaborated. However, I believe that the reason supporting the conclusion reached by her in her ruling should be based more on "the acquiescing defense" set in article 13(a) of the convention, as defined by **Hague Convention Act (returning of abductees children) 1991**, than "the consent defense" included in the same article. I hereby explain my reasons.

2. Due to the circumstances described in my colleague's ruling and also in the minority opinion of vice president, judge **A. Avraham** in the Regional court in Nazareth, I believe that the respondent – upon leaving recently for United States, has actually "consented" – at least at the time – to the daughter's retention in Israel and to leaving her in her mother's hands in Israel at that point. This may be inferred from the request made by the respondent to Rabbinate court in order to cancel the detaining warrant issued against his departure from Israel by the plaintiff – a procedure at the end of which the abovementioned warrant was cancelled consensually. In this context we remind that the Rabbinate court has unique jurisdiction in the divorce claim between the parties, being Israeli citizens who got legally married in Israel. furthermore the respondent was willing within the "financial agreement" deliberated between the parties (and was not signed eventually due to reservations made in fact by the plaintiff) – to promise to move all the personal equipment of the minor to Israel and pay her monthly alimony in NIS. At the same time he wished to guarantee himself seeing arrangements with the child whenever he arrives at Israel.

This information, learned from the evidence included in the case, suffice to view them, **under the unique circumstances of the matter at hand**, as kind of "acquiescing" and waiving the "first aid" granted by force of the convention. see: C.A. 7206/93 **Gabay vs. Gabay** I.r. 51(2) 241, 256-259 (1997); C.P.A. 7994/98 **Dagan vs. Dagan**, I.r. 53(3) 254, 273-276 (1999).

All this is said without expressing my opinion regarding the continued procedures between the parties.

Furthermore – differently. Even if we were to say that the respondent did not explicitly express his "acquiescing" with the child's retention in Israel at that point, the plaintiff could have concluded from the agreements achieved during negotiations with the respondent towards signing the abovementioned "financial agreement" that he has effectively "acquiesced" for the time being with the child's move to Israel, or consented to it. Therefore, by force of estoppels law – the respondent is not entitled to the temporary aid requested by him. An expression of similar view may be found in the reasoning (although not the conclusion) mentioned in the ruling of the house of Lords in England in the matter of In re H and Others (Minors) [1997] UKHL 12 (which also refers to Israeli couple) – written by Lord Browne-Wilkinson, who emphasized that it is an exception to the rule. See also: In re AZ (Minor) [1993] 1 FLR 682.

Such defense is also known in France, where it led to a result similar to the one laid out by us here. See: ruling of Aubrey vs. Aubrey, as quoted in the book: Beaumont & McEleavy, The Hague Convention on International Child Abduction (1999), P. 122 (note that the abovementioned book criticizes the abovementioned ruling and also mentions a contradicting French ruling – Horlander c. Horlander. Cass. 1re civ., 1992 Bull. Civ. L. No 91-18177; D.S 1993, 570).

3. In light of all the abovementioned – the appeal is accepted, as suggested by my colleague, judge **E. Arbel**.

J u d g e

Judge U. Vogelman:

1. I concur with the majority of determinations detailed in the opinion of my colleague Judge **Arbel**, and the reasons for them. I also concur with her determination that the "acquiescing defense" set in article 13(a) of the convention, as defined by Hague Convention Act (returning of abductees children) 1991, does not apply to the current matter. However, regretfully, I cannot concur with her determination that the consent defense set in the same article was proven in the current case, which allows not to return the mutual daughter to U.S.A; that, since the respondent consented to it in an early draft made during negotiation to prepare a "financial agreement" which did not develop at the end of the day.

2. As my colleague points out, contract law applies to the consent defense, including all implications of it. A fundamental principle of contract law, which has relevance to the current matter, is the **principle of reciprocity**. According to this principle, the advantage of a contract, that is the benefit received from the other party, and the disadvantage, that is the thing to be given to the other party, have to be reciprocal (see Daniel Friedman and Nili Cohen **Contracts** 149 (volume 1, 1991) (hereinafter: **Friedman and Cohen**). A situation in which the legal status of the two parties is divided, so one of them is being held for his sayings and concessions during negotiation while the other party is exempt and released of his obligations – places the parties in an uneven position, and therefore does not coincide with the abovementioned principle.

3. The agreement draft in the current matter is a result of a negotiation between the parties, in which none of the parties fulfilled all his wishes. Examining the various ingredients of the contract suggests that each side waived and compromised until eventually they've reached consent to a draft, in which the various obligations are dependant and conditioned to each other. Assuming that the respondent's consent to the plaintiff's and the daughter's stay in Israel is a one-sided, unconditional obligation does not coincide, in my opinion, according to the factual infrastructure before us, with the various ingredients of the contract nor with its purpose – to settle all controversial issues in a manner that will allow the parties to end their marriage. Therefore, since at the end of the day the draft did not develop into a binding agreement, the obligations included in it do not stand, as they were conditioned by each party's execution reciprocally.

4. Indeed, as my colleague points out, "there is nothing holy about signature", and if foundations of decision and specification exist in an agreement, it is valid even without a signature. However, as she points out, these foundations, and especially that of decision, did not exist in the matter at hand and therefore the contract did not develop. In this state of

affairs, I do not believe that one can separate the respondent's consent regarding one of the ingredients of the agreement's draft from the overall agreement, and view it by itself, even though the framework in which it was supposed to fit did not emerge. Furthermore, these things do not deny the possibility of creating a legally binding obligation – even one-sided by nature – even during negotiating towards a contract which did not develop at the end of the day to an agreement. Such are for example situations in which one party has reason to rely on a contract, following obligations given or presentation shown by the other party during negotiation (**Friedman and Cohen**, p. 519-648). However, I do not believe that in the matter at hand the factual infrastructure laid before the discussing court indicates that the respondent said or presented anything that might have brought the plaintiff to reasonably rely on it in a manner that justifies protection by law.

5. Beyond the abovementioned, using the points of agreement within a negotiation draft of an agreement, which failed at the end of the day, may carry with it negative implications regarding the willingness of parties to maintain an effective negotiation towards a contract. Note well: the parties might refrain from presentations, declarations or proposals, which include concession in favor of the other party, since they'll fear that such concessions may be held as evidence against them in a future proceeding that the parties may have (see C.A. 172/89 **Sela insurance company Ltd. Vs. Solel Bone Ltd.**, I.r. 47(1) 311, 333 (1993)). It may create difficulties in achieving an agreement, thwart compromises and unnecessarily prolong debating.

Since the consent defense does not apply, there is no choice, in my view, but to reject the appeal.

J u d g e

By majority of opinions it was decided as specified in the ruling of Judge E. Arbel.

Given today, Iyar 13th 5771 (May 17th 2011).

J u d g e J u d g e J u d g e

In the Supreme Court
Sitting as the High Court of Justice

HCJ 5185/13
Hearing Date: July 29th 2015

John Doe
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Petitioner

VERSUS

1. The Great Rabbinical Court in Jerusalem
2. The Regional Rabbinical Court in Haifa
3. Rabbi Rabbinical Judge Zion Boaron
4. Rabbi Rabbinical Judge Eliezer Igra
5. Rabbi Rabbinical Judge Daniel Edri
6. Management of the Rabbinical Courts
7. The Justice Minister
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RESPONDENTS

Opinion of the Attorney General

1. As per the decision of the Honorable Court dated November 11, 2014, and the decisions dated January 25, 2015 and March 2, 2015, the Attorney General is hereby honored to submit his opinion, as follows.

General

2. The Petitioner is an Israeli citizen, resident of New Jersey, United States. The ruling of the Great Rabbinical Court dated April 21, 2013, states that on September 7, 2011, the Petitioner was obligated to divorce his wife, the

Respondent 9. The Petitioner does not comply with the ruling, and as a result, the Respondent 9 remains *agunah* [chained, according to Jewish law, a woman bound in marriage by a husband who refuses to grant a divorce or who is missing and not proved dead].

3. In his Petition, the Petitioner attacks a decision in his regard, granted by the District Rabbinical Court of Haifa on July 31, 2012, and approved by the decision of the Great Rabbinical Court dated April 21, 2013.

4. On October 28, 2014, the State Attorney applied to the Honorable Court asking to the extend it intends to deal in the question of the authority of the Rabbinical Court to issue its decision dated July 31, 2012, to allow representatives of the Attorney General to submit a written opinion in the matter.

5. The reason for the request is the complexity of the question related to the authority of the Rabbinical Court to issue decisions not originating in primary legislation, in anything related to enforcing an obligation to divorce.

6. The opinion of the representative of the Attorney General is that the Petition should be rejected *in limine*. The Attorney General believes that the Petitioner should not receive equitable relief in this Honorable Court, since the Petitioner bluntly disregards a duly issued judicial resolution, imposing on him to divorce the Respondent 9.

7. As for the question of authority, the opinion of the Attorney General is that although the Respondent 2 is authorized to issue limitation orders only in the framework drawn by the legislator, it may provide a non-obligating opinion of Jewish law as for the manner in which the Petitioner should be treated, in light of his refusal to divorce his wife despite the ruling of the Rabbinical Court obligating him to do so.

Main Relevant Facts

8. The Petitioner, as aforesaid, is an Israeli citizen, required to divorce his wife, the Respondent 9. The Petitioner does not comply with the ruling, and the Respondent 9, a woman in her early 30's, remains chained for over three years.

9. From the opinion of the legal advisor of the Rabbinical judiciary, it appears that on March 8, 2011, the Petitioner fled Israel despite a stay of exit order issued against him in the framework of the proceedings in the Rabbinical Court. It further appears that the Petitioner does not pay support for the Respondent 9 or support for their shared daughter.

10. On January 29, 2012, the District Rabbinical Court of Haifa issued limitation orders against the Petitioner, according to its powers pursuant to the Rabbinical Courts Law (Issue of Divorce Judgements) 5755-1995 (the "**Issue of Divorce Law**").

In this decision, the Rabbinical Court issued a stay of exit order, pursuant to Section 2(1) of the Issue of Divorce Law; prevention of receiving passport order, pursuant to Section 2(2) of the Law; prevention of receiving or holding a driver's license, pursuant to Section 2(3) of the Law; and a limitation order in banks, pursuant to Section 2(6) of the Law.

In its decision, the District Rabbinical Court noted that it is aware these orders are ineffective since the Petitioner is outside Israel, but noted that they serve as a step for issuing more severe limitation orders, according to the possibilities listed in the Law.

Copy of the Court Decision dated January 29, 2012, is attached and marked **MS/1.**

11. On February 8, 2012, the District Rabbinical Court issued another order, this time pursuant to its power by Section 4a of the Rabbinical Courts Law (Enforcement of Orders) 5716-1956 (the "**Enforcement of Orders Law**").

In this decision, the Court ordered the Israeli consulate in New Jersey, or any other consulate across the United States to refrain from granting consular

services or any form of assistance of the Petitioner, until he agrees to stand in front of the Court. In addition, it ordered the Diplomatic and Civil Law Department in the Ministry of Foreign Affairs to invite the Petitioner to the Israeli consulate so that his passport may be apprehended.

Copy of the decision of the Court dated February 8, 2012, is attached and marked **MS/2.**

12. There is no dispute these actions did not bring the Petitioner to arrange for divorcing the Respondent 9.

13. On July 31, 2012, the District Rabbinical Court issued another decision concerning the Petitioner. In this decision, titled "Decision - Order" it was noted that the Respondent 9 asked the Court to impose additional sanctioned on the Petitioner, since the sanctions imposed to that date did not cause a divorce.

In this decision, the Rabbinical Court noted that "this is an extremely hard case of *agunah*. The husband was obligated to divorce already on 8 of Elul 5771, September 7, 2011, and has been chaining the wife ever since, staying outside the borders of Israel in the State of New Jersey, living his life, using every possible trick to evade compliance with the ruling, while the wife in Israel longs for the divorce."

In light of the above, the Regional Rabbinical Court has determined as follows:

> "C. Since the husband refuses to obey to the ruling, he may be called a criminal, and his sentence is detailed in the Shulchan Aruch Yore Da'at Article 334.
>
> D. We order anyone who can to help release the wife from being *agunah*, and therefore to refrain from doing a favor to the husband and/or talk to him and/or add him to *minyan* [quorum of ten men required for

public Jewish prayer service] and/or negotiate with him and/or bury him. As explained in the *Rama.*

E. The Court accepts the request of the husband and therefore the Court allows to publish the name and details and photo of the husband, ..., in the community of Fair Lawn, New Jersey, and/or anyplace without limitation, including a notice that anyone who knows of his whereabouts and can assist getting a consent to the divorce from the husband, is ordered to do so, while anyone helping him to continue chaining the wife is an accomplice.

F. The Court provides a copy of this decision to Rabbi Avidan Elkin - Rabbi of the community...."

Copy of the decision dated July 31, 2012 is attached and marked **MS/3.**

14. The Petitioner appealed on this last decision to the Great Rabbinical Court in Jerusalem. From the ruling issued on April 21, 2013, it appears that the Petitioner argues, among else, that the decision of the Rabbinical Court was granted *ultra vires.*

In this regard, the Rabbinical Court has determined, with reference to a prior ruling in this issue (case no. 8455-64-1) that the Court may impose restriction not detailed in law in order to enforce the divorce ruling, including social restrictions known as "restraining of *Rabinu Tam*".

The Great Rabbinical Court did not deem it fit to intervene in the decision of the District Rabbinical Court. In anything related to the reference of the District Court to the burial of the Petitioner, the appeal was rejected by the majority.

Copy of the ruling of the Great Rabbinical Court dated April 21, 2013 is attached and marked **MS/4**.

15. The Petitioner submitted this Petition to the Honorable Court on the above ruling. In his Petition, the Petitioner attacks the decision of the Rabbinical Court dated July 31, 2012, among else arguing that the Rabbinical Court is not authorized to grant orders not originating in primary legislation.

16. On November 11, 2014, the Honorable Court issued an *order nisi*, directed at the Respondents 1-2, ordering them to appear and reason why they would not cancel the ruling and orders issued by them in the matter of the Petitioner, and to reason how these orders correspond with the provisions of the Issue of Divorce Law or the Enforcement of Orders Law; and to reason the way of granting the right of argument granted to the Petitioner and the origin of the power for the ex-territorial application of the orders.

In the framework of this decision, the Attorney General was asked to consider reporting and submitting his opinion.

Opinion of the Attorney General

Preliminary Argument - Granting Equitable Relief to a Person Disregarding the Legal Instance and Its Decisions

17. The Petitioner refuses to grant divorce, refusing for over three and a half years to comply with a judicial decision issued in his case by Respondent 2.

18. Our opinion is that this behavior constitutes a cause for rejecting the Petition *in limine*, since it is inappropriate to grant equitable relief to the Petitioner, while he acts in contrary to judicial decisions of a competent Court and has been causing misery for his wife for a long time.

19. It appears that this is what this Honorable Court meant when ruling in HCJ 5782/99 **Israel Ben Ami v. Great Rabbinical Court in Jerusalem** (dated 8.12.99, published in Nevo):

> "To the point, the key to the prison is held by the Petitioner, and clearly once consenting to the divorce he will be released of prison. Under these circumstances, even the discretion granted to the High Court of Justice to refrain from granting relief, even when the attacked action is defected, justified denying the Petition."

20. In other contexts also, the Honorable Court has determined more than once that a petitioner who takes the law into his hands - his petition will be rejected *in limine.*

The Honorable Court has indicated that in his guiding ruling in the issue of dismissing a petition *in limine* for taking the law into one's hands, HCJ 3483/05 **D.B.S. Satellite Service (1998) Ltd. v. Minister of Communication**, Tak-El 2007(3) 3822 (2007).

> "It is a rule that "a person must decide in his heart whether he seeks relief from the court or takes the law into his own hands. A person cannot do both at the same time..." (...)... The Court will not open its door to a person who takes the law into his hands, disregards legal provisions and wants the authority to face a done deal. The prohibition on taking the law to one's hands it part of a broader rule, demanding that a litigant seeking relief from the Court acts with integrity (...). This is a rule defined as preliminary cause for approaching the High Court of Justice or the Court for Administrative Affairs. Therefore, a dishonest litigant might find his petition rejected *in limine* without discussing his arguments themselves.

See also HCJ 8898/04 **Jackson v. Commander of the IDF Forces in Judea and Samaria Area** Tak-El 2004(4) 609 (2004); HCJ 1547/07 **Bar Kochva v. Israel Police**, Tak-El 2007(3) 433 (2007); HCJ 7697/03 **Tenenberg v. State of Israel - Ministry of Defense**, Tak-El 2003(3) 2302 (2003); HCJ

6102/04 **Sheik Ali Muadi v. Ministry of Interior**, Tak-El 2005(3) 3926 (2005), and more.

21. Needless to mention the long time elapsing since the issuance of the ruling did not cause the Petitioner to change his ways. Therefore, for this reason only, the Petition should be rejected *in limine.*

Question of Authority

Normative Framework

22. Marriage and divorce of Jews in Israel are conducted according to the Torah law, pursuant to Section 2, Rabbinical Courts Jurisdiction (Marriage & Divorce) Law 5713-1953 (the "**Rabbinical Courts Jurisdiction Law**"). According to the Torah law, issuing a divorce certificate requires also the consent of the husband, otherwise it is "fake divorce" in fact disqualified divorce, except in such cases where, according to Jewish law, the husband may be coerced to consent. Since the 10th century, accepting the divorce certificate by the wife also requires her consent, pursuant to a regulation (*cherem*) attributed to *Rabinu Gershom Me'or Hagola.*

This starting point grants much power to the spouse declining the divorce. Over the years, both the Jewish law and the Israeli legislator have developed tools meant to pressure spouses who refuse to consent to the divorce. All these tools are located on the thin line between coercion leaving judgement to the refuser, and coercion which might cause the divorce certificate to be fake, and therefore disqualified.

23. In 1995, the Knesset enacted a temporary order which later became the Rabbinical Courts Law (Issue of Divorce Judgements) 5755-1995. The law was enacted following the distress of women who remain chained for many years, due to the refusal of their husbands to consent to the divorce.

24. Therefore, in any discussion in the rights of refusers, we should remember that the weak party in the equation is not the refuser but his spouse, who is the real

victim. The refuser's spouse find himself many times is a situation of mental abuse, extortion, and sometimes loses his ability to build a new family for himself.

25. The Law grants the Rabbinical Court power to impose on a person disobeying the divorce ruling a limitation order (Section 1 of the Law). A limitation order might be by the way of denying rights, such as leaving the country, receiving a passport, receiving a driver's license, appointment for position in the service of the State, and occupation limitations and limitations of managing bank account (Section 2 of the Law).

A limitation order can also be by the way of coercive arrest for a period not exceeding five years, with the total periods of arrest not exceeding 10 years (Section 3 of the Law).

26. And indeed, in the years since the Law was enacted, the Rabbinical Courts have managed to release many women from being *agunah* by imposing limitation orders, or even threatening to issue such orders.

27. To conclude, the Law grants the Rabbinical Court several tools for dealing with the painful social phenomenon of divorce refusal, causing much suffering to women and hurting their dignity and liberty.

28. Clearly, the provisions of the Issue of Divorce Law do not derogate from the powers of the Court, pursuant to the Court Disgrace Ordinance or pursuant to the Enforcement of Orders Law.

Opinion of the Attorney General

29. The opinion of the Attorney General is that every judicial body, including the Rabbinical Court, is limited to the authorities conferred upon it by the legislator, in our case, the provisions of the Issue of Divorce Law and the Enforcement of Orders Law, and therefore it cannot order imposing limitations not included in the legal provisions.

See in this regard, HCJ 3269/95 **Katz v. District Rabbinical Court in Jerusalem** Padi 50(4) 590.

30. Note, that the Attorney General does not accept the expanding perception, that the unique jurisdiction granted to the Courts to discuss matters of divorce according to Torah law includes enforcement powers not listed in the law. His position is that the Rabbinical Courts Jurisdiction Law has granted the Court judicial powers according to the Torah law. To be precise - judicial powers, not enforcement powers. In order to grant enforcement powers for executing rulings or decisions, different and explicit authorization by law is required, as in the Issue of Divorce Law. Another interpretation allegedly makes redundant the need of a separate mechanism for enforcing rulings of the Rabbinical Court, as well as in other fields of civil law, such as the Execution Law 5727-1967.

See in this regard the opinion of Honorable Judge Zilberg in HCJ 54/55 **Arye Rosenzweig v. Chairman of the Execution Office** Padi 9, 1542.

31. This means that the list of limitation orders in the Issue of Divorce Law and the powers of the Courts pursuant the Enforcement of Orders Law is a final list and the Rabbinical Court has no authority to impose additional limitations on those who refuse to divorce, not appearing in these provisions.

32. This position was previously presented by the Attorney General in High Court of Justice 1046/01 **Israel Ben-Ami v. the High Rabbinical Court of Jerusalem** (decision dated September 24th 2001) Tak-El 2001(3) 1538 (the "**Ben Ami Case**"). This case discussed, among else, the issue of the power of the Rabbinical Court to order imposing different sanctions, not listed in the law, on a civil prisoner serving penalty of imprisonment imposed on his due to his refusal to obey to a ruling obligating him to divorce his wife.

In these proceedings, the Attorney General's position was presented, whereby: "Although Respondent 1 [the rabbinical court] is authorized to impose restricting orders only under the framework provided by the legislature alone,

it may make various recommendations to Respondent 4 [the Israel Prison Service] concerning the recalcitrant husband. Respondent 4 may view these recommendations as part of the factual basis for formulating its administrative decision, but is not obliged to accept them ...".

It should be noted that in the paper submitted on behalf of the Attorney General, it was stated that this position is accepted by the Rabbinical Courts Administration, and the courts were instructed to act accordingly, namely, not to use imperative statements towards the Prison Service but rather, in appropriate cases, recommend or ask it to exercise its authority to deprive the prisoner of various benefits.

In a partial verdict rendered on September 24th 2001 the honorable court ruled that "the Attorney General's position is acceptable to us; it is also acceptable to Respondent no. 1. Hence, in the event any decision is inconsistent with the position of the Attorney General – the position of the Attorney General is preferable. In the event that court decisions contain recommendations – or according to the Attorney General's position, non-binding decisions – these are to be seen at most as recommendations that have no binding effect".

Copy of the response on behalf of the representative of the Attorney General in the Ben Ami Case is attached and marked **MS/5.** The Partial ruling dated September 24, 2001, is attached and marked **MS/6.**

33. To conclude, the rabbinical Court is required to act within the framework of its powers. This does not prevent the court from recommending the proper halachic (Jewish Law) manner for treating a recalcitrant husband defying the judgment requiring him to grant his wife a divorce and free her from her "chained" (agunah) status, a recommendation that any person may elect to accept or not. Under these circumstances, the official decision of the rabbinical court dated July 31st 2012 must be viewed as a non-binding opinion of the court as to how the petitioner should be treated in light of the petitioner's refusal to grant his wife a divorce, despite the ruling of the rabbinical court requiring him to do so.

Today,
July 23rd 2015

Roey Choueka, Adv.

Senior Deputy, State Attorney

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief for the United States as Amicus Curiae was served upon

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